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IN THE

Supreme Court of the United States

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October Term, 1973

No. 73-1771

CURTIS HOWE SPRINGER, aka CURTIS H. SPRINGER, and HELEN SPRINGER, husband and wife; DR. CURTIS H. SPRINGER FOUNDATION (aka DR. CURTIS HOWE SPRINGER FOUNDATION); and BASIC FOOD PRODUCTS,

Petitioners,

vs.

UNITED STATES OF AMERICA, and UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

UNITED STATES OF AMERICA, and UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Curtis Howe Springer, *et al.* hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The decision of the hearing examiner (Nos. R-1888 and R-1907, App., *infra,* pp. 1-27) is dated July 6, 1972. The decision of the office of Appeals and Hearings of the United States Department of Interior (8

IBLA 123, App., *infra*, pp. 28-34) affirming that of the hearing examiner is dated November 14, 1972. The decision of the Secretary of Interior (IBLA 73-66, App., *infra* p. 35) affirming the decisions below is dated December 14, 1972. The United States District Court, Central District of California, Memorandum of Decision that Partial Summary Judgment in Favor of Plaintiff Should Be Granted (App., *infra*, pp. 36-42) is dated February 26, 1973. The United States District Court, Central District of California, Partial Summary Judgment in Favor of Plaintiff (App., *infra*, pp. 43-44) is dated March 1, 1973. The United States District Court, Central District of California, Order denying Defendant's Motion to Dismiss "Memorandum of Decision and Partial Summary Judgment" in Favor of Plaintiff (App., *infra*, pp. 45-47) is dated March 1, 1973. The opinion of the United States Ninth Circuit Court of Appeals (App., *infra*, pp. 48-54) dated January 17, 1974 affirmed the decision of the lower district court is reported as *United States v. Springer*, 491 F. 2d 239 (1974). The subsequent opinion of the United States Ninth Circuit Court of Appeals (App., *infra*, p. 55) denying Petitioner's Petition for Rehearing, is dated February 26, 1974.

Jurisdiction.

The decision sought to be reviewed of the United States Ninth Circuit Court of Appeals (App., *infra*, p. 55) was made and entered on January 17, 1974. An order denying a timely motion was made and entered on February 26, 1974. (App., *infra*, p. 55.) The statutory provision conferring jurisdiction on this Court to review the judgment in question is 28 USC Sec. 1254(1).

Statement.

This case involves the validity of mining claims located by the Petitioners in September, 1944, and held and worked by them without question by the government for approximately 24 years before this particular case was filed by the United States Attorney in 1968.

The circumstances of this case began on September 13, 1944, when Dr. Curtis Howe Springer. his family and some friends located a number of mining claims on desert land near Baker, in San Bernardino County, California; the validity of these claims being the subject of this action. During those 24 years the Petitioners worked their mining claims, produced minerals therefrom and disposed of the minerals, as allowed by law.

The Springer mining claims involved in the contest are nine placer claims, each of which covers 80 acres, and two lode claims covering 20 acres each.

Petitioners asserted that the claims were valuable for silver and gold, sand and gravel, and for crystals useful for health and curative purposes.

The land was remote and barren. Even today the Springer site is an isolated spot in a large California desert with virtually no economic activity within many miles, and except for improvements is of very low value.

The Springers have taken the minerals from the land and marketed them as various products. There is sufficient demand for the minerals to be consumed by the public at the site. To aid for disposal of these minerals and using proceeds from the sale of the mineral products, the Springers built a 40-room health retreat with an investment conservatively estimated by the Department of Interior to be $700,000. The demand con-

tinued until these activities ceased in accordance with court order.

During the years between 1944 and 1968, the Petitioners constantly kept in touch with the Department of the Interior. Curtis Howe Springer visited the various local and regional offices of the Bureau of Land Management many times. These offices repeatedly approved the Springers' use of the land. It has not been refuted that Curtis Howe Springer visited various Bureau of Land Management offices in Sacramento, Los Angeles, Bakersfield, Reno, and Riverside over 110 times before 1968, that he met with the highest officials in those offices, that he discussed his use of the land and his proposed improvements and that these officials approved his use as coming within the mining law for establishing claims. All the improvements were completed before 1955.

On October 25, 1968 the United States Attorney filed the original complaint based on the allegations that the United States owned the land involved and the Petitioners were trespassing thereon.

At approximately the same time, on November 26, 1968, two Complaints in Contest were filed by the Bureau of Land Management of the Department of the Interior, to declare these claims invalid. Petitioners defended these contests asserting that they had long established claims with irrevocable rights.

The contests in the Department of the Interior resulted in a holding on July 6, 1972, by the Administrative Law Judge that same claims were void for lack of discovery, that some of the minerals claimed were not discoverable and that use of the other minerals was not a use of minerals of which would support a claim under

the mining laws (App., *infra,* pp. 22-27.) The Administrative Law Judge ignored Petitioners long holding of the land under asserted claim pursuant to 30 USC §38. The Department's Board of Appeals upheld the lower decision on November 14, 1972 noting that it agreed with the principles applied by the Administrative Law Judge on the issues of burden of proof, discovery and application of 30 USC §38. That decision discounted any value as to Petitioners long holding of the land. Petition for Reconsideration was denied on December 14, 1972.

The United States Attorney moved that the United States District Court confirm said decision by the Department. This was done by the District Court in its Memorandum Decision dated February 26, 1972 supporting a Partial Summary Judgment dated March 1, 1973.

Petitioners objected to the decisions of the Department on questions of law raised in the department including an objection that the findings of fact were not supported by substantial evidence. (See Answer to Supplemental Complaint; Notice of Motion and Motion to Dismiss, December 21, 1972; Supplemental Answer and Supplemental Motion to Dismiss, January 8, 1973.)

Petitioners sought a hearing on these errors of law allegedly made in the Department of the Interior. During the hearing in the District Court on the government's Motion for Summary Judgment, the Petitioners moved that there be a hearing on the legality of the decision of the Department of the Interior. Despite Petitioners' repeated claims that a trial *de novo* was not sought, but that a hearing on the legal merits of the Department of the Interior's decision was sought [Rep.

Tr. pp. 17-26, Motion for Partial Summary Judgment], the District Court held that Appellants sought a trial *de novo*. The court held that estoppel was not available against the government in this case.

Petitioners then moved to dismiss said Memorandum of Decision and said Partial Summary Judgment; said motion was denied by the District Court under date of May 1, 1973.

Petitioners appealed to the United States Ninth Circuit Court of Appeals and questioned the correctness of the lower court and Department of Interior decisions on essentially all of the grounds raised in this writ as clarified in the Reasons for Granting the Writ. The decision against these Petitioners was entered on January 17, 1974 and a timely petition for rehearing was denied on February 26, 1974.

Questions Presented.

Whether the Department of Interior consistent with the mining law of 1872, as interpreted by this court and courts below, can disprove a mining claim asserted over the applicable statute of limitations period, without showing or attempting to show that there was no discovery of a valuable mineral throughout the period for the applicable statute of limitations.

Whether 30 USC Section 38 as interpreted by this court and courts below, allows a claimant, holding and possessing claimed land, over a period longer than established for the statute of limitations applicable to perfecting such claims to prove discovery by a lower burden of proof than required for claims subject to other provisions of the mining laws.

Whether under these circumstances the doctrine of estoppel may be asserted against the government acting in its sovereign capacity.

Whether crystals loosely classified as bathing salts discovered on Petitioners' land are not subject to location pursuant to the mining laws.

Whether the mining laws of 1872 which require that a claim must be made upon a discovery of a valuable mineral, preclude the value of such mineral from being derived from the use of the mineral relating to health, curative or therapeutic purposes.

Whether a trial court may deny a party the right to a hearing and argument on the legal basis for a challenged administrative agency decision where said decision is subject to incorporation into the decision of the trial court and is the complete basis for summary judgment against petitioner.

Whether the mining law requires that the marketability of a mineral deposit must be determined by existing current demand for the mineral demonstrated by actual sales or whether in the absence of sales marketability may be demonstrated by other factors.

Statutes Involved.

Administrative Procedures Act, United States Code, Title 5, Section 556(d) as pertinent to burden of Proof

> Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof.

Section 702 *Right of Review*

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.

Section 703 *From and Venue of Proceeding*

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in a civil or criminal proceedings for judicial enforcement.

Section 706. *Scope of Review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Act of May 10, 1872, 30 U.S.C. Section 38.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under Sections 21-24, 26-30, 33-48, 50-52, 71-76 of this title, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Act of February 25, 1920.

Section 181. Lands subject to disposition; persons entitled to benefits; reciprocal privileges; helium rights reserved

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.

. . .

Act of February 25, 1920

Section 261. Prospecting permits; lands included; acreage

The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a

prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, in lands belonging to the United States for a period of not exceeding two years: *Provided,* That the area to be included in such a permit shall not exceed two thousand five hundred and sixty acres of land in reasonably compact form.

Section 262. Leases to permittees; survey of lands; royalties and annual rentals

Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 261 of this title have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit at a royalty of not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market; the lands in such lease to be taken in compact form by legal subdivisions of the public land surveys or, if the land be not surveyed, by survey executed at the cost of the permittee in accordance with regulations prescribed by the Secretary of the Interior.

. . .

Section 263. Permits to use or lease of nonmineral lands for camp sites, and other purposes; annual rentals; acreage

In addition to areas of such mineral land which may be included in any such prospecting permits or leases, the Secretary of the Interior, in his dis-

cretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an annual rental of not less than 25 cents per acre, the exclusive right to use during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding forty acres in area, for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

Multiple Surface Use Act of 1955, 30 USC 611.

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effectively validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties". . . does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

Administrative Regulation Involved, 43 CFR §3711.1 (1973).

(a) . . .

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the me-

chanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

REASONS FOR GRANTING THE WRIT.

In holding that these claims were null and void, the Department of Interior and the courts below in affirming the Department, in our view, have seriously misapplied the Mining Law of 1872. These decisions below establish or reflect policies that affect a significant group of persons making mining claims on public land and affect important rights asserted by such persons. Many commentators have suggested that the Department of Interior applies the mining law not so much in accord with the letter of federal mining and land law legislation and related Congressional intent but more in accord with its own policy untethered to such expressed legislation and intent.[1] These commentators have noted that such policy is continuously construed against the contestant. Mr. Reeves noted in his above-cited work that in the Department of the Interior ". . . decisions holding that a discovery has been established are virtually nonexistent." at page 4. Granting this petition on the issues presented below will allow a determination as to whether such policy was applied in discord with Congressional legislation to the detriment of Petitioners.

Before we discuss the details of the reasons granting this petition, there is one rule which we believe will cause all of the judgments herein by the District Court and Court of Appeals to be reviewed. Petitioners feel that the proceedings below were so much in error

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[1]H. R. Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, Rocky Mountain Mineral Law Institute, Vol. 10, 1965, pages 467, 473; Ladendorf, *Suggestions for Congressional Action Relating to the General Mining Law*, Rocky Mountain Mineral Law Institute, Vol. 11, 1966, page 441; Reeves, *The Origin and Development of the Rules of Discovery*, Land and Water Law Review, Vol. 8, 1973, page 1.

that this court should invoke its holding in *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922) that:

> "legal discretion vested in the Trial Court does not extend to a refusal by it to apply well-settled principles of law to a conceded state of facts."

Although our case was and is based fundamentally on the Mining Law of 1872, that law was neglected by the Department of Interior and by both Courts below, as were five decisions of this court;

1. *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 316 (1930)
2. *Noyes v. Mantle*, 127 U.S. 348, 351 (1888)
3. *Richmond Mining Co. v. Eureka Mining Co.*, 103 U.S. 839 (1881)
4. *Belk v. Meagher*, 104 U.S. 279 (1881)
5. *Boesche v. Udall*, 373 U.S. 472 (1963)

These cases will be discussed as appropriate in detail in the following Reasons for Granting the Writ.

I.

Petitioners Established Irrevocable Rights to Mineral Patents by Showing Mere Evidence of Discovery Throughout Any Five-Year Period After 1941 but Before 1968.

A. A Claimant Establishes a Right to a Federal Mineral Patent in California by Showing Discovery Throughout a Five-Year Period as Well as Showing "Working" and "Possession" Throughout That Period but Not as of the Date of the Hearing.

This issue is one of first impression in this court. No reported court case considering this issue has been discovered.

Petitioners assert that they had done all that was necessary to acquire irrevocable rights to mineral pat-

ents. The last step and mere formality necessary to protect a patent cannot be a bar to acquiring a patent after all of the substantive requirements have been met.[2] Petitioners held, worked and performed the statutory assessment work on the claims over a period well in excess of the period for the applicable statute of limitations.

The Department of Interior presented evidence only relating to present discovery but not to any five-year period after Petitioners made claim to the land and before the government commenced this suit. Though this issue was raised below, there were no articulated responses to these objections and arguments in the opinions below.

30 USC Section 38 provides that a right to a mineral patent is established upon a showing of evidence, in part, that a claimant has ". . . held and worked [a] claim for the period equal to the time prescribed by the statute of limitations for mining claims of the state or territory." In California this period is 5 years (Applied in *Judson v. Herrington,* 71 Cal. App. 2d 565, 162 P. 2d 931 (1943); *Lind v. Baker,* 31 Cal. App. 2d 631, 88 P. 2d 777 (1939)).

It should appear clear that the purpose of a statutory provision such as this is to prevent forefeiture by claimants who have devoted time, efforts and money

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[2]Under other parts of the Mining Law, if Petitioners had acquired full rights under mineral patents, they would have had title equivalent to fee simple. It is beyond dispute that absent extraordinary consideration not here applicable that once a patent is granted, the control of the land department to the patented property ceases and the government cannot assert title to the premises. The patent grantee acquires all the estate of the United States in the surface, and all beneath, save exceptions not herein relevant. And that once such a right has acquired, the government cannot infringe upon such right, even if it can later show that the property will not support a claim.

over long periods of time. In addition, there is authority that the mining laws are to be applied so that miners not suffer forfeiture because of their relative lack of sophistication. *Lindley on Mines,* Third Edition, Volume 2, Section 381. As will be shown below, this provision relaxes some evidentiary requirements and thereby makes it easier for a long time claimant to establish a right to a patent than for a short term claimant under other sections of the mining law. It would appear that requiring a showing of discovery at the time of patent application or at a time of contest after the five-year period would defeat this purpose of preventing forfeiture.

Requiring a showing of discovery as of the time of the hearing would also appear to make the ". . . right to a patent" established under the statute an empty right. Even though the right had accrued it could be extinguished at any later time, even though throughout the five-year period the claimant could have established discovery.

In *Wilbur v. U.S. ex rel. Krushnic,* 280 U.S. 306, 315, 316 (1930), which resulted from proceeding instituted by the General Land office to have a claim declared null and void, this court held that once a claimant has perfected a right to a patent, the United States holds title in trust for the claimant and that such title is good as secured by patent. *Wilbur v. Krushnic* at page 317. In *Belk v. Meagher,* 104 U.S. 279 (1881), this court said that if a claimant actually holds possession and works the claim for the requisite period of time under the local statute of limitations, his right to patent is complete. See also *Noyes v. Mantle,* 127 U.S. 348, 351 (1881); *Boesche v. Udall,* 373 U.S. 472 (1963).

Unless the right accrued in the past from a discovery during the statute of limitations period these cases would have no meaning, for once the right to patent accrued it could still be taken away by requiring a showing at some juncture well past the statute of limitations period. In the case of Petitioners, review occurred approximately 21 years after the asserted rights matured; assuming that discovery could have been shown during the 1944-1949 period.

Furthermore, analogously, a recent decision in estoppel law relating to the United States government suggests that private claimants rights when asserted against the government are not to be easily lost. That decision also holds, in relation to such rights, that the government should deal with its citizens fairly. (*United States v. Lazy F C Ranch*, 481 F. 2d 985 (9th Cir. 1973).) For holding of this case see Reason for Granting Writ on Estoppel ground.

The *Lazy F C Ranch* opinion supports Petitioners because petitioner occupied the land for 24 years under mining claims with governmental knowledge and approval while improving the land. To here allow the government to interpret Section 38 to require a showing of discovery as of same date past the statute of limitations period denies the fair play required of the government in dealing with its citizens.

Under parts of the mining law other than Section 38, it has been decided that discovery must be shown as of the date of the hearing considering the claim. *Adams v. United States*, 318 F. 2d 861 (1963). No case discusses whether discovery is required as of that date under Section 38, or whether the more appropriate rule would be that discovery must be shown during the earlier stat-

ute of limitations period. Furthermore, some cases established the requirement of showing a discovery valid at the time of the hearing because such a requirement eliminated conjecture on the future possibilities of a claim and not as a limitation on the past discovery. Most cases which have required a showing of discovery on some date in the past applied such a rule because it seemed to be a reasonable method for preventing bad faith locations on lands after such lands have been withdrawn from mineral location.

B. Petitioners Established Irrevocable Rights to Mineral Patents Under 30 USC Section 38 by a Lower Burden of Proof on the Element of Discovery During Any Five-Year Period After 1944 but Before 1968 Than Is Required Under Other Provisions of the Mining Law and Lower Than Was Applied in This Case.

This issue is one of first impression. This Court has not considered the evidentiary burden for "discovery" under 30 USC Section 38. No reported case has considered the issue.

30 USC Section 38 provides that a mineral patent shall be provided upon a showing of evidence by claimants that they have "held and worked their claim for the period equal to the time prescribed by the statute of limitations for mining claims of the state or territory"

There is basic agreement that Section 38 relaxes the evidentiary burden required of a claimant as to certain elements for establishing a claim. *Cole v. Ralph,* 252 U.S. 286, 305, 306; *McCowen v. Maclay,* 16 Mont. 234, 40 Pac. 602 (1920). There is no case authority suggesting the evidentiary burden required as to the establishment of the element of discovery under Section 38. This Court considering somewhat different

factors than here held in the *Cole* case that there must be discovery of a valuable mineral. In that case, this court did not concern itself with the evidentiary showing required for establishing discovery, but noted that there was "no discovery." 252 U.S. at page 305.

In the *Cole* case it was held by this court that Section 38 does not dispense with discovery. The decisions below have cited such holding of the *Cole* case to counter Petitioners' assertion that Section 38 requires less of an evidentiary burden as to discovery than the other parts of the mining law require. Petitioners point out that Section 38 lessens strict evidentiary requirements relating to location and title. Yet it has been held that Section 38 lessens strict evidentiary requirements regarding such factors. In consistent fashion, it would appear a logical conclusion that the evidentiary showing for "discovery" on very old claims should be similarly relaxed.

As noted in the preceding Reason for Granting the Writ, Section 38 provides protection for the long term claimant against forfeiture because of strict proof requirements which may operate against the unwary and unsophisticated miner. The same purpose is served by relaxing the burden of proof for the element of discovery for the long term claimant.

Application of a lower burden of proof on the element of discovery would also further this protectionary purpose in another way. Unsophisticated and good faith miners also need protection against changes in Depart-

ment of Interior policy. The commentators cited earlier noted that the Department of Interior creates policy not always in alignment with the statutory mining laws, that this policy is furthered by tightening the rules of discovery. The Reeves article cited earlier and James B. Sult, *Marketability and the Mining Law,* 10 Arizona Law Review 391, pages 403-405 (1968) show that some change applicable to Petitioners occurred during the period which applies to Petitioners' claims. Consequently, as applied only to the good faith long term claimant, relaxing the burden of proof would protect against such policy changes.

Allowing occupants such as Petitioners to stay on the land would not have a serious impact on public land use and mining law policy. Users over such a long period of the statute of limitations making a mining claim cannot, by common reason be significantly large in number, and such claims necessarily would be for relatively small quantities of land. This must be balanced with the good faith that the government must show to its citizens. (See Reasons for Granting the Writ in the previous section and in the following section on estoppel.) To callously remove these persons would counter such requisite good faith.

This court has previously shown that it considers similar questions relating to discovery and to other elements as applied to Section 38 worthy of review. *Cole v. Ralph,* 252 U.S. 286 (1920); *Belk v. Meagher,* 104 U.S. 279 (1881); *Crisman v. Miller,* 197 U.S. 313 (1905); *Diamond Coal and Coke Company v.*

United States, 233 U.S. 236 (1914); *Wilbur v. Krushnic,* 280 U.S. 306 (1930).

The Department of Interior as affirmed by the District Court and Court of Appeals applied heavy burden of proof requirements identical to those applied under other parts of the mining law.

In the decision of the Hearing Examiner in his Findings and Conclusions of Law (App., *infra,* pp. 22-23) the first statement is that:

> "The Contestant presented a prima facie case that there was not a discovery of a valuable mineral deposit on any one of the mineral claims through the testimony of a mining engineer."

At the end of that first paragraph, the Hearing Examiner said:

> ". . . It, thus became the burden of the contestees to establish by a preponderance of the evidence that there was a discovery of a valuable mineral deposit on each claim." The decision of the Interior Department's Board of Land Appeals dated November 14, 1972, on the very first page makes this statement: "A mining claim is properly declared invalid where the government establishes a prima facie case of lack of discovery, and the contestee does not show by a preponderance of evidence that the claim is valid."

Petitioners presented evidence of their claims through two experienced mining engineers. If as Petitioners assert, they should have encountered a lower burden as to discovery under Section 38, they may have met such lower burden through their presentation of evidence.

Consequently, clarification as to operation of the mining law on this issue merits a granting of the writ.

II.

Where Justice and Fair Play so Require the Department of the Interior Should Be Estopped to Assert the Invalidity of a Mining Claim When Said Agency Permitted, With Full Knowledge and Approval, One to Claim and Improve Said Land Under the Mining Laws Over a 24-Year Period.

In the proceedings below Petitioners repeatedly pointed out that between 1944 and 1968 they had made over 100 trips to the highest regional authority for the Bureau of Land Management. Petitioners were there repeatedly assured that their occupation under the mining laws was proper and that for all practical purposes the land belonged to Petitioners. Relying on such representations Petitioners turned this barren, remote and worthless land into a virtual oasis with an investment of over $700,000. Furthermore, it was beyond concept that the government would change its mind on land which appeared to be unwanted and useless. Besides undertaking some operations which are traditionally considered to be mining, Petitioners also took minerals from the property and accepted donations from those who used the minerals for health, curative and therapeutic aids. Many of these mineral products were consumed by visitors at the site. The local land office throughout the 24-year period, knowing the extent and character of mineral use of the land did not object to this as not meeting the requirements for claims under the mining laws.

In the proceedings below, the government did not contest these alleged events, but argued that such events

were irrelevant because the government could not be estopped. The trial court sustained such argument. There is some indication that the Department of Interior changed its policy relating to unpatented mining claims over the period of Petitioners' uncontested occupation and that such change in policy resulted in this suit. But the rulings below made introduction of this change irrelevant.

Traditionally, one has not been able to assert estoppel against the government when it is acting in its sovereign capacity. Administration of public lands is considered by many authorities to be a sovereign activity of a government.

Recent consideration in United States District Courts and a United States Court of Appeal have shown that there may be little wisdom in automatically denying estoppel against the government when it is acting in its sovereign capacity. Such continued application has been noted to create injustice and does not discourage a government from correctly dealing with its citizens.

The strongest statement against strictly denying estoppel against the government acting in its sovereign capacity was made by the Ninth Circuit Court of Appeals in *United States v. Lazy F C Ranch,* 481 F. 2d 985. The decision was dated July 13, 1973, eleven days after Petitioners filed their opening brief in the Court of Appeals. In the *Lazy F C Ranch* case, it was held that estoppel is available against government actions such as those in Petitioners' case if the government's wrongful conduct threatens to work a serious injus-

tice and if the public's interest would not be unduly damaged by imposition of estoppel. Such estoppel was held applicable even if the government is acting through the unauthorized acts of its employees in a capacity that has traditionally been described as sovereign as distinguished from proprietary, although a federal court may be more reluctant to estop the government when it is acting in this capacity. The decision in that case reflected a belief that earlier decisions by this court in *Utah Power and Light Co. v. United States,* 243 U.S. 389 (1917) and *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947) had been undermined by recently evolved reasoning in *United States v. Georgia-Pacific Co.,* 421 F. 2d 92 (9th Cir. 1970) and *Brandt v. Hickel,* 427 F. 2d 53 (9th Cir. 1970). Estoppel against the government was allowed using similar reasoning in *Gestuvo v. District Director of The United States Immigration and Naturalization Service,* 337 F. Supp. 1093 (C.D. Cal 1971). These cases are particularly applicable because estoppel against administrative action was involved. The opinions noted that as part of the administrative process basic notions of fairness must apply.

It is unquestioned that Petitioners acted in good faith and that the government created a situation of detrimental reliance. Therefore, the writ should be granted to determine whether the doctrine of estoppel should be made applicable to Petitioners' circumstances.

III.

Minerals Taken From the Soil on the Springer Site Characterized by the Department of Interior as "Bathing Salts" Are Locatable Minerals.

Petitioners extracted certain minerals labeled by them as ZZYZX crystals from the land which is the subject of this petition. Such crystals were given to visitors who in turn made donations to Petitioners. The donations were the basis for the improvements of the land.

The Examiner for the Department, as affirmed by the Board, held that the ZZYZX crystals were not locatable because the crystals were bathing salts and silicates of sodium and, as such, were only subject to the lease provisions of 30 USC 181, *et seq.* (Contests Nos. R-1888 and R-1907. App, *Infra*, p. 24.)

The applicable sections concerning sodium are 30 USC 261-263. "Bathing salts" is a term which includes a very large family of compounds, not necessarily or even probably containing any of the compounds or elements listed in Sections 261-263 or in any of the other sections following Section 181.

Sections 261-263 are not applicable to the circumstances of this case. Those sections apply to circumstances where extraction of sodium, or other substances not related to this case, is the prime goal. Section 261 provides for prospecting permits for chlorides, sulfates, carbonates, borates, silicates or nitrates of sodium. Section 262 states that it applies only when

> ". . . valuable deposits of one of the substances enumerated in section 261 . . . have been discovered . . . and that such land is chiefly valuable therefor . . ."

Section 262 also specifies royalties from extraction of those compounds.

Section 263 specifies that certain lands may be used or leased as incident to extraction of the above-mentioned substances.

Petitioners do not rely "chiefly" on sodium, sodium nitrates, or any of the other listed substances, for the mineral character of the land. Sodium content and sodium compounds under the above sections are important as only a part of the chemical complex in the crystals.

There are other major constituents such as silicon and there are many other intermediate and minor constituents in the surface crystals (App., *infra*, p. 13) not referred to in the above statutory sections. Crystals from farther below the surface have a slightly different makeup (App., *infra*, p. 14) but, also, contain many substances not covered by these sections. Intermediate and smaller quantities of elements are important to the attractions and value of the crystals.

There is no authority making Sections 261-263 applicable merely because minerals contain, in some amount, elements or compounds referred to in those sections. Otherwise, since those elements and compounds are so pervasive in nature, those sections would apply to virtually all discovery and mining.

Furthermore, it should be obvious, that because Petitioners have been able to market the crystals as health, curative and therapeutic aids the crystals have special value. Thus the crystals are not common varieties subject to 30 USC §611 and 43 CFR §3711.1 and not excluded from valid mineral location. However, such

provisions are not applicable; Petitioners' claims predate the Common Varieties Act.

Therefore, the writ must be granted to clarify application of these statutory and administrative provisions.

IV.

The Mining Laws of 1872 Do Not Preclude the Value of Discoverable Minerals From Being Derived From Health or Curative Applications.

The Department of Interior, Interior Board of Land Appeals held that use of the mineral characteristics of the land for health and curative purposes was a use proscribed by the mining law, as the Board held that:

> "There is nothing in the mining law which authorizes the location of a mining claim on the public lands for the construction and use as a health resort." (App., *infra*, p. 31.)

Petitioners urge that nowhere do the mining laws or court cases as applied to mining claims, or patents, limit the use of minerals to "non-health spa purposes." But the Examiner held that there is no authorization for use of minerals for health spa purposes. The mining law promotes, encourages, and authorizes use of minerals for any useful purpose, unless specifically controlled by certain provisions of the law.

A health retreat for the purpose of consuming minerals at the site is no different than the equipment and apparatus used to extract minerals from a mine. Both are used to process the minerals into a marketable human use. Nevertheless, the Board arbitrarily found a health retreat for purposes of mineral consumption proscribed.

Petitioners claimed that these minerals found at the location contained special and unique properties for such use, however, the Department of Interior summarily held that such uses are not sufficient for establishing a mining claim. For purposes of establishing a claim except as to agricultural applications there is nothing in the mining law that limits the use of a mineral. Use of a mineral for health and curative purposes is not proscribed. Land valued for mineralized springs has been withdrawn from location, but there has not been any such withdrawal of health and curative mineralization unassociated with spring water. Limits have been set as to what specific minerals may not be located, but no statutory limit has been placed as to the use a mineral may be put. In supposed accordance with the Common Varieties Act of 1955, 30 USC §611, the Secretary of Interior has attempted to regulate use through regulation 43 CFR 3711.1. The materials under consideration here are not subject to the act. Petitioners' use of any minerals subject to the act predate 1955.

The Department of Interior in other cases not reaching the courts has held certain health and tourist related uses of minerals not uses sufficient to establish a claim. *United States v. Elkhorn Mining Co.*, 2 IBLA 383 (1971) (exacting an admission charge from persons who desire to enter a mine and breathe radon gas). *Cf. South Dakota Min. Co. v. McDonald*, 30 L.D. 357 (1900) (natural caves); *Lovely Placer Claim*, 35 L.D. 426 (1907) (saline baths). Without admitting the correctness of those decisions, Petitioners' use of the minerals is more related to conventional concepts of mining of minerals.

The marketability rule (See *United States v. Coleman*, 390 U.S. 599 (1968)) as used to determine dis-

covery of a valuable mineral does not involve any inquiry into the expected use of the mineral; the relevant considerations all being related only to economics of extracting the particular minerals and income that would be produced. Thus, if the mineral is marketable, inquiries into use are irrelevant.

Consequently, this writ should be granted to determine whether there are certain uses for minerals that prevent possession, location and a marketable discovery of such minerals from constituting a claim under the mining laws.

V.

Petitioners Were Denied Proper Judicial Review in the District Court Proceedings in That They Were Denied a Hearing on the Legal Merits of the Decisions in the Department of Interior.

For the purpose of testing an administrative decision such as made by the Department of the Interior, the Administrative Procedure Act, Sections 702 and 703, provides that there shall be a judicial review. Section 706 defines the scope.

Here there was a suit first instituted by the government to question Petitioners' occupation and then a decision of the Department of Interior leading to judicial enforcement. Review was requested by Petitioners. The Court mistakenly thought that Petitioners were asking for a trial *de novo*. The Court then made a private examination of the record and the Department's decisions. There was no hearing as required by law.

Federal Rules of Civil Procedure, Rule 56(c) and other parts of those rules require a hearing. There is good reason for such a hearing. The parties are afforded an opportunity to correct any judicial misap-

prehensions before a decision is made. Later review is not sufficient because of the natural difficulties in undoing a decision, because a complete record has not been developed and because of the many presumptions on appeal that a lower court decision is correct.

Petitioners objected to the decisions of the Department on questions of law, including an objection that the findings of fact were not supported by substantial evidence. (See Answer to Supplemental Complaint; Notice of Motion and Motion to Dismiss, p. 74, in the record on appeal.)

Petitioners sought a hearing on the errors of law allegedly made in the decisions of the Department of the Interior. During the hearing in the District Court on the Plaintiff's Motion for Summary Judgment, Petitioners moved that there be a hearing in open court on the legality of the decisions of the Department of the Interior.

VI.

The Test Applied by the Administrative Law Judge That Lack of Sales Shows That Sand and Gravel Is Not Marketable Is an Incorrect Statement Under the Marketability Rule as Enunciated by This Court.

This court sanctioned marketability as a rule of discovery for valuable minerals in *United States v. Coleman*, 390 U.S. 599 (1968). Cases decided by the Department of Interior have applied that rule in the past so that showing of actual sales from the claim is a very important if not a necessary element.

Since the Petitioners' case was briefed and argued in the Court of Appeals, there has been a radical departure in principle in the application of the mar-

ketability rule by the Department of Interior to minerals unquestionably found in vast quantities on property subject to sand and gravel claims; actual sales are not now as dispositive of the question of discovery as in earlier cases. The new view reverses a long line of cases and is directly applicable to the Springers' claim for sand and gravel. The case expressing this view very closely parallels the decision of the Department of Interior in the Springer case, but with a different result. The principle involved is the same principle relied upon by the administrative trial judge in the Springer case, and therefore demands reconsideration of the Springer claims. Relevant parts of this very recent case, *United States v. Lauren W. Gibbs,* 13 IBLA 382, November 21, 1973, are reproduced in the appendix as Appendix I.

The Court of Appeals denied reconsideration on this issue.

The Administrative Law Judge in the Department of Interior proceeding applied criteria for marketability in the Petitioners' case which have been overruled in the *Gibbs* case. The Administrative Law Judge based his decision regarding the Springers on the factors that there was no mining of the massive sand and gravel deposits, that there were similar surrounding deposits from which market demand could be met and that the Springers gave away the sand and gravel as proof that such minerals were not marketable. (App., *infra,* at p. 26.) No other criteria as to the sand and gravel were considered.

In the *Gibbs* case, the United States had contested on grounds that one could not claim sand and gravel where such asserted claim had not been shown to be

marketed at a profit and where the market demand could be met from surrounding property. The Administrative Law Judge and Interior Board of Land Appeals in that case held that such inactivity and alternate market supply cannot be used as a sole basis for a conclusion that a claim is invalid. In the Interior Board of Land Appeals *Gibbs* decision the opinion noted that

> ". . . lack of evidence as to sales made from the claim and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion that the claim is null and void for lack of discovery of a valuable mineral deposit." 13 IBLA 382.

As in the *Gibbs* case, there is no question that deposits of sand and gravel exist on the Springer mining claims. The Administrative Law Judge as affirmed by the Interior Board of Land Appeals, noted that:

> "The parties are in agreement that there is a massive deposit of sand and gravel along the base of Soda Lake Mountains, that it is hard and usable for construction purposes, including concrete aggregate, and that it was used for the construction of buildings at ZZYZX. Dr. Springer testified that he let the State Highway Department take the sand and gravel from the claims and that he is willing to let the County Road Department or any individual use the material free of charge . . ." (App., *infra*, p. 19.)

And also equivalent to *Gibbs*, there are other sand and gravel deposits in the area. (App., *infra*, pp. 56, 57.) The emphasis placed upon the availability of sand and gravel in the nearby areas was relied on

heavily as evidenced by the testimony of Mr. Ingram (App., *infra*, pp. 63-64) and Mr. Cruskie. Contest Nos. R-1888 and R-1907 (App., *infra*, pp. 65-67).

Therefore, the writ should be granted in order to resolve the inconsistency created by the implicit rejection by the Court of Appeals of the view expressed in the *Gibbs* decision because of its failure to reconsider in light of the *Gibbs* decision.

Conclusion.

It is respectfully submitted that the questions presented herein are important questions of federal law which have not been, but should be, settled by this Court and that the Petition for Certiorari should be granted.

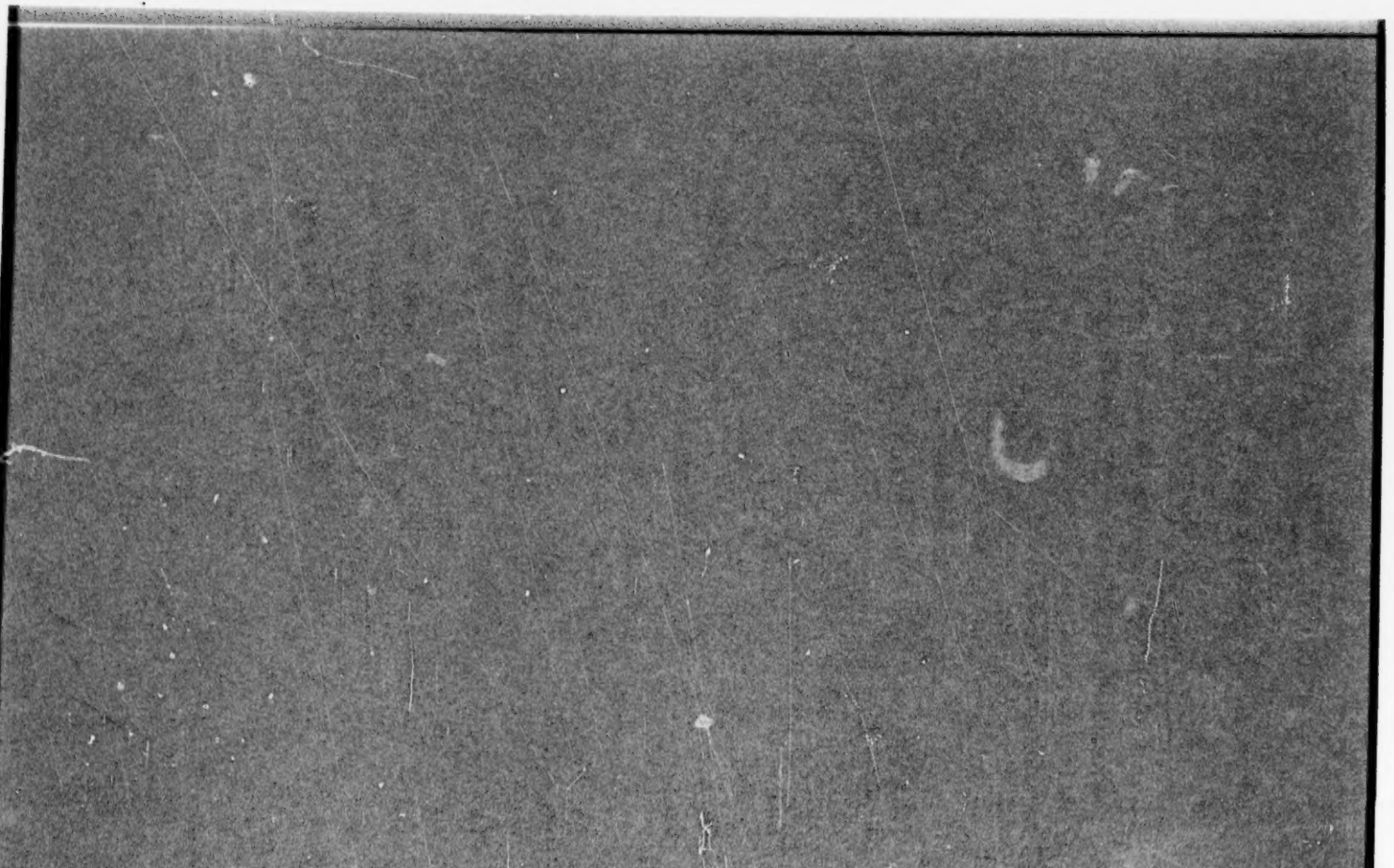
May 23, 1974.

Respectfully submitted,

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Of Counsel.





APPENDIX A.

Decision.

United States Department of the Interior
Office of Hearings and Appeals
Hearings Division
Room W-2426, 2800 Cottage Way
Sacramento, California 95825

July 6, 1972

United States of America, Contestant v. Curtis H. Springer, et al., Contestees. Contest Nos. R-1888 and R-1907 Involving Buddie No. One lode mining claim; and ZZYZX Nos. Two, Three, Four, Five, Six, Seven, Eighteen, Nineteen, and Twenty placer mining claims, located in Secs. 2 and 11, T. 12 N., R. 8 E., and SE-¼ Sec. 35, T. 13 N., R. 8 E., S.B.M., San Bernardino County, California.

Preface

These proceedings were initiated by the Bureau of Land Management through the filing of complaints in the Riverside Land Office on November 26 and 27, 1968. In Contest 1888 the contestant alleged as to the lode claim that:

1. Valuable minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
2. The lands embraced within the claim are non-mineral in character.

In Contest 1907 the contestant alleged with respect to the placer claims that:

1. Valuable minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

The contestees, through the law offices of Lonergan, Jordan & Gresham, San Bernardino, California, filed a timely answer in which these allegations were denied. Thereafter, a hearing was held in Los Angeles, California on September 16, 1969. The Government was represented by George H. Wheatley, Attorney, Office of the Solicitor, U.S. Department of the Interior, Los Angeles. The contestees were represented by Dilling & Dilling, Attorneys at Law, Chicago, Illinois and Mrs. Gladys Towles Root, Attorney, Los Angeles, California. The law firm of Lonergan, Jordan & Gresham had withdrawn from the proceedings. A second hearing was held on January 13, 1970. At that hearing Mrs. Root represented the contestees. The firm of Dilling & Dilling had withdrawn from the proceedings. The third hearing was held on December 14, 1971. George W. Nilsson, Attorney, Los Angeles, represented the contestees. Mrs. Root by this time had withdrawn from the proceedings. The witnesses were Edward F. Cruskie, a mining engineer employed by the Bureau of Land Management; Earl Westerfield, a graduate of Ohio State with a degree in chemistry, who has been employed in the smelting and processing of precious ores; Mrs. Helen Springer, one of the contestees; Dr. Springer; and Stuart Ingram, a mining engineer.

Summary of Testimony

The contestant's case was presented through the testimony of Mr. Cruskie. He examined the claims and surrounding Soda Mountains on several occasions. He stated that the mountains were underlain with granitic and metamorphic material of the Cenozoic age and that they contained no outcrops of quartz or any minerals which could have commercial possibilities. Also he examined a U.S. Geological Survey Report, Bulletin 1045-C, which contains the results of core drilling of Soda Lake. The lake was drilled to depths from 700 to 1000 feet and the cores showed silts, mud, and miscellaneous clays, but no potentially valuable salt or potash beds. On the claims he found no shafts, tunnels, or workings which he felt justified sampling. He concluded that there was not a mineral deposit with sufficient value on any one of the claims to justify development (Tr. 49 and 419).

The story of the Springer operation at ZZYZX (pronounced "ZiZex") on Soda Lake near Baker, California, was told by Dr. Curtis H. Springer[1] in an open letter to the public (Ex G) and as a witness at the hearing. In his open letter he started with the heading "One of the Strangest Stories Ever Told." The story in his words begins:

> "Let us now go back some twenty-five years to September 13, 1944. I was forty-eight years of age, had accumulated all that I had need of for life

[1]He attended high school for less than two years and a bible school for one year. Although he does not have a doctoral degree, he has used the appellation of doctor for many years. He is now in his mid 70's (Tr. 308, 312).

and had retired. I had been a coal miner, had studied for the ministry at West Virginia Wesleyan College and Moody Bible Institute and had received my credentials as a Methodist preacher. I had been privileged to occupy many pulpits in evangelistic work and with my tent have been privileged to point many souls to the Master. Having promised God that I would never take a collection or accept money in the ministry, I made my living largely as a contractor in many states, but always using any profits to finance my ministry and the building of Health Institutions in six states. All of these institutions, had as their objective the helping of those who were physically and spiritually sick, to guide them where possible to God and right thinking so that they might be able to lay hold on that power and strength that God alone can grant unto His children. I had been active in many other fields of endeavor, and as many of you friends know, had been broadcasting from the very beginning of radio, back in the early nineteen twenties."[2]

By 1944 he had a ministry of the air and was broadcasting from coast to coast 7 days a week. At the time one of the leading radio programs was sponsored by a company selling mineral crystals produced in Texas. Because of the popularity of these crystals, he sought a similar product in California. After he found a reference to Fort Soda Springs in a book at a second hand store in Los Angeles, he and a number of other people began searching in San Bernardino County for the Fort. He eventually found the remnants of the aban-

[2]The lengthy quotations are from Exhibit G.

doned Fort on Soda Lake south of Highway 15 approximately half way between Barstow and the Nevada State Line. Here there was "a beautiful oasis with wild ducks, wild geese, fish in abundance but apparently abandoned by civilization". The next day he and his associates started doing "discovery work" and monumenting mining claims. Eventually they filed mining locations for 12,800 acres of public land in and adjoining the dry lake bed. Their intent at the time was to recover saline minerals by solar evaporation (Tr. 216). Again in his own words:

> "Here was a brand new challenge for me to come out of retirement and go back to work. I was only forty-eight, with no need for money and having been a contractor for years, I accepted this as a challenge from God to get out my tools, reactivate my contractor's license and go back to work.
>
> "We sold our beautiful home in Hollywood. I was fed up with social life anyway, so got busy building another institution that we could dedicate to God and service to His children."

At first they lived in tents and had their "Sunday afternoon prayer meeting under a screwbean mesquite tree as we thanked God for his many blessings and the blessed privilege of converting historic Fort Soda into a modern Christian institution for the glory of God and service to him." After a short period Navajo Indians helped him make concrete blocks by hand and with these blocks the first permanent buildings were built. Later through the efforts of a cooperative Judge in Los Angeles men who needed to get away from "liquor" were sent out to help build the permanent

buildings.[3] During the course of constructing the buildings the Riverside Cement Company supplied over 15,000 sacks of cement at cost, and the National Metals and Steel Corporation, located at Terminal Island, gave them thousands of dollars worth of stainless steel stoves, ovens and other equipment salvaged from naval ships which were decommissioned after World War II. They now have a 40-room, 80-bed motel and again in Dr. Springer's words:

> "We have twenty thousand gallons of Propane storage and twelve thousand gallons of Diesel fuel storage. We have our own heavy duty road equipment including two large bulldozers, a giant earth mover, scrapers, road graders, etc. Also, about five thousand shade trees, two thousand palms and over a thousand flowering bushes, all landscaped and under irrigation. Millions of gallons of sparkling mineral water flows by hydrostatic pressure from the depths of the earth to a level of seven and a half feet above the desert. In fact, Lake Tuendae is five feet above the desert level and we have three more lakes under construction because we have an abundance of wonderful water. In fact, we have a beautiful fountain on Crusoe Island, in the middle of Lake Tuendae. It sparkles in the desert sunlight.
>
> "God has blessed us in a wonderful way and during these years, as quoted from the San Bernardino County Sheriff's Annual: 'Over one million people have been cared for at ZZYZX Mineral Springs, including three-fourths of a million free meals and one-fourth of a million free beds.'

[3]See Tr. 375. The record is not clear whether this arrangement was voluntary or involuntary.

> This would, of course be an approximate figure but not one person has ever been refused food and shelter in these twenty-five years.
>
> "With all of these accomplishments, under God, having become a reality, with a modern 100% fireproof institution with full power and fuel reserves and with twenty-five year history of achievement, we are happy to state that no one penny is owed on any equipment or buildings. We have never taken a collection, yet God has seen fit to answer our prayers in the creation of this institution with no financial obligations for others to pay. We will win this battle, but need your prayers."[4]

In objecting to the contest brought by the Bureau of Land Management, Dr. Springer stated:

> "Millions of acres have been given to the Railroads and great corporations but an institution, dedicated to God's work and with a history of over twenty-five years of service to humanity and with seventeen of these years openly functioning with apparent U.S. Government approval, at least never a word or letter to the contrary, must now be called 'squatters' or 'trespassers,' and ordered to leave their expenditure of approximately two million dollars. It just doesn't make sense, and herein comes the desperate need of your prayers and assistance.
>
> "Let us pause for a moment and take stock of the situation and then let us ask God to guide us that we might deal with this problem as is right in His sight. He is guiding us, you know.

[4]The "battle" is in reference to this proceeding.

"Here we have an institution that has been functioning for twenty-five years. Thousands of shade trees, millions of blossoms, three concrete swimming pools, one lake completed and three more started with ample water for all. Fireproof buildings to house over one hundred of His children, complete power and storage facilities installed and working. All of this built and completely paid for without a penny of debt against any part. No need for a campaign to raise money to pay old bills and a staff of directors all of whom are dedicated to our work and have an income separate and apart from this work and who are happy to work for this institution without pay."

"Have you heard of anything like this before, and yet it is about to be taken from us because the U.S. Land Office, for some reason, don't want us to have it? They have millions of acres of additional land all around this property but in twenty-five years have not made a move to develop or improve any of the adjoining land.

"They have watched us build this institution, spend over two million dollars in construction, maintenance and operation, they were shown plans, pictures of developments and for over seventeen years voice no opposition. Their Manager told our committee it was open land and available to us, but now they refuse to perform in keeping with his assurances from the first.

"By the simple stroke of a pen, the land could be ours as a grant. They have given millions of acres to railroads and other large corporations. What is wrong with encouraging God's work, just a little. We have told them we will be happy to defray any

costs incidental to such a move as they might feel was best for the transfer. We have shown our good will by spending all that we had and have left no debts for materials or construction. Their attitude just doesn't make sense . . .".

During his broadcasts Dr. Springer mentions a number of products that he offers to send on request without charge. Each gift is accompanied by a suggestion that a suitable contribution be made to the Dr. Curtis Howe Springer Foundation so that the work for the Lord may be continued. In the open letter the list of products which are given away and the suggested contributions are listed as follows:

"Order from this List and Allow Two to Four Weeks for Delivery by Parcel Post	Quantity	Retail Price	Suggested Contribution
ANTEDILUVIAN HERB TEA (Botanical Laxitive)	24 ozs	$15.00	$10.00 3 for $25.00
DELICIOUS MANNA (Vegetarian Food Supplement)	24 ozs	15.00	10.00 3 for 25.00
NERVE CELL FOOD (N.C.F.)	24 ozs	15.00	10.00 3 for 25.00
ANTHRON (My Mother's Favorite Food)	24 ozs	25.00	15.00 2 for 25.00
"YUTH" (A Food For The Young at Heart)	24 ozs	15.00	10.00 3 for 25.00
HOLLYWOOD "PEP COCKTAIL" (PICKUP)	24 ozs	15.00	10.00 3 for 25.00
"RE-HIB" (Potential Iron Bearing Foods)	24 ozs	15.00	10.00 3 for 25.00
PRISTINE (Vegetarian, Potential Protein Foods)	24 ozs	15.00	10.00 3 for 25.00
CAL PLUS (Potential Calcium Bearing Foods)	24 ozs	15.00	10.00 3 for 25.00
BAN-O-WHEY (Appetite Discourager)	24 ozs	15.00	10.00 3 for 25.00
NEPTUNES (Potential Iodine Bearing Foods)	24 ozs	15.00	10.00 3 for 25.00

"Order from this List and Allow Two to Four Weeks for Delivery by Parcel Post	Quantity	Retail Price	Suggested Contribution
TROPICOES (Dehydrated Foods of The Tropics)	24 ozs	15.00	10.00 3 for 25.00
LAMOURI (Vegetarian, Potential Vitamin C Foods)	24 ozs	15.00	10.00 3 for 25.00
F-W-O (Foods Delightfully Pleasing to Women)	24 ozs	15.00	10.00 3 for 25.00
NORM (A Basic Food Supplement)	24 ozs	25.00	15.00 2 for 25.00
ZY-MUD (Minerals from the Mojave for Facials)	30 ozs	15.00	10.00 3 for 25.00
ZZYZX FOOT CRYSTALS (For Poor Tired Feet)	40 ozs	15.00	10.00 3 for 25.00
B-PLUS (A Food Supplement for the Whole Family)	24 ozs	15.00	10.00 3 for 25.00
O-M-R (An Anti-Acid Containing Food Value)	24 ozs	15.00	10.00 3 for 25.00
COTOLOYDS (DELICIOUS FOOD Supplement)	24 ozs	15.00	10.00 3 for 25.00
ALLEROIDS (Natural Source Containing Vitamin A)	200 cap	15.00	10.00 3 for 25.00
EMBROIDS (Natural Source Containing Vitamine E)	300 cap	15.00	10.00 3 for 25.00
IMPERIALS (German Formulae—Pain Relieving)	200 tab	5.00	4.00 3 for 10.00
ORGANIC RETURN (Containing Foods from the Sea)	2 prod	15.00	10.00 3 for 25.00
DANGO (To Assist in Conditions of Dandruff)	2 prod	15.00	10.00 3 for 25.00
MO-HAIR (A Plan to Assist Live Hairs to Grow)	3 prod	15.00	10.00 3 for 25.00
COSMO (Suggested by an Indian for Lovely Skin)	3 prod	15.00	10.00 3 for 25.00
HEMORRHOID RELIEF (A System to Assist Nature)	3 prod	25.00	15.00 3 for 25.00
SHANGRALAE (Suggested by an Asian Missionary)	4 prod	20.00	15.00 2 for 25.00

"If you have need of any of our products, we will thank God for the privilege of sending them to you as a gift. We do not sell them to you, but ship them as a gift when we are convinced you have need of them and are unable to contribute toward their cost. Learn to 'Eat Your Way to Health' ".

The two underlined items are produced from the ZZYZX claims. After every rainfall (there are sometimes several a year) the water on the lake bed draws saline minerals up from the clay bed of the lake. When the water is evaporated by the heat of the sun, the minerals crystalize and are left as incrustations on top of the clay bed (Ex. I). The lake bed is approximately 7 miles wide and close to 14 miles long. The crystals on the surface of the lake bed are gathered, crushed into a fine powder, and after perfume is added to improve the fragrance, placed in small cans for distribution. Also the crystals are secured by running the water from mineral springs (on Claims 2, 3, 4, 5, 6 and 7 as shown on Ex. L) into large vats where again solar heat is used to evaporate the water which in turn causes the minerals to crystalize (Tr. 236).

The wrapper for the can (Ex. H, page 4) shows a picture of Dr. and Mrs. Springer, a photo of their motel and the following label:



This Product Is Never Sold. It Is Given, As A Token Of Love And Appreciation, To Those Who Contribute To Our Radio Ministry.

As houses well stored with provisions are likely to be full of mice, so the bodies of those that eat much are full of disease.
—Diogenes

ZZYZX CRYSTALS
Reg. U.S. Pat. Office

CONTENTS
40 OZ.

DELIGHTFULLY FRAGRANT BATH MINERALS
A Natural blend of Minerals Extracted from the Waters of ZZYZX Mineral Springs
Solar Evaporation

Silicon, Sodium, Aluminum, Magnesium, Iron, Potassium, Calcium, Titanium, Boron, Lead, Vanadium, Barium, Manganese, Strontium, Copper, Chromium, and Nickel.

EXTERNAL USE ONLY

• To hasten results, breath deeply, get at least eight hours of uninterrupted sleep in twenty-four, exercise in moderation and think only clean and constructive thoughts. Also, drink one pint of water one hour before each meal, none at meal time or for two hours thereafter; none before retiring.

A Helen Springer Product

BASIC FOOD PRODUCTS
BAKER CALIFORNIA
DR. CURTIS HOWE SPRINGER FOUNDATION

A spectrographic analysis of the crystals prepared by Smith-Emery Company, show the following constituent minerals:

Element	Approximate Percent
MAJOR CONSTITUENTS ..... Silicon, Sodium	10 or Greater
INTERMEDIATE CONSTITUENTS ..... Aluminum, Magnesium, Iron, Potassium, Calcium	2 to 10
MINOR CONSTITUENTS:	
Titanium	0.5 %
Boron	0.5 %
Lead	0.05 %
Vanadium	0.05 %
Barium	0.05 %
Manganese	0.01 %
Strontium	0.01 %
Copper	0.005%
Chromium	0.005%
Nickel	0.001%
Other elements	None detected

The crystals generally are within the top six inches of the lake bed. Below the top six inches is the clay that is ground, perfumed, and placed in cans and distributed for use as a facial mud pack under the name ZY Mud or Mojave Mud. Like all of the other Springer products this clay is mailed without charge to anyone who requests it, and each package has a list of suggested contributions. This clay was analyzed spectrographically by Smith-Emery Company with the following results (Ex. H, page 7):

Element	Approximate Percent
MAJOR CONSTITUENTS ..... Silicon	10 or Greater
INTERMEDIATE CONSTITUENTS ..... Aluminum, Iron, Sodium, Potassium	2 to 10
MINOR CONSTITUENTS:	
Magnesium	1.0 %
Calcium	1.0
Titanium	0.5
Barium	0.1
Strontium	0.05
Molybdenum	0.01
Vanadium	0.01
Manganese	0.01
Chromium	0.005
Copper	0.001
Silver	Trace
Other Elements	None Detected.

Again the label on the can has the warning for "External Use Only" and the suggestion, "To hasten results, breath deeply, get at least eight hours of uninterrupted sleep in twenty-four, exercise in moderation and think only clean and constructive thoughts. Also, drink one pint of water one hour before each meal, none at meal time or for two hours thereafter; none before retiring." The label also contains the statement—"This Product is Never Sold. It is Given, as a Token of Love and Appreciation, to Those Who contribute to our Radio Ministry." (Ex. H, page 5).

The open letter ends with the statement:

> "At the end of this letter, I am printing a voucher that you can use in sending help. Your gift will be to ZZYZX Community Church, not to me. If it is

sent to me, much of it would have to go for taxes, so please fill out the voucher and send as much as God makes possible. I am not asking for a pledge for a year or longer. This is an emergency needed right now.

"Perhaps I have made an awkward presentation to you, but if I have, God will smooth it over so you will understand. We simply cannot let this beautiful place go to the enemy and become leased out as a night club, golf club or any other type of worldly place. God has honored our efforts all these years and I believe He is just letting this happen as sort of a test, to see if our faith is founded on the Rock, Christ Jesus. With your help and prayers and His blessing, we shall continue our dedicated work among His children."

This was followed by a gift voucher and a contribution voucher worded as follows:

A—GIFT VOUCHER Amount $

I have read Brother Springer's letter explaining the need to prevent the U.S. Land Office from taking ZZYZX Mineral Springs. You will find enclosed my gift to ZZYZX Community Church, Helen Springer, Treasurer. God helping me, I will send another gift next month. Use this gift to save ZZYZX Mineral Springs and to spread the Gospel of Jesus, our Savior.

Name .....

Street and Box .....

City ..... State .....

MY FAVORITE RADIO STATION FOR GOSPEL PROGRAMS IS .....

B—CONTRIBUTION VOUCHER For above Order $.....

Kindly ship the products I have circled in the order blank above. You will find my contribution enclosed and know that we will be praying for God's blessing on your work at ZZYZX Mineral Springs. I can use ..... additional copies of this letter to give to my friends. We must save ZZYZX Mineral Springs from the Liquor Monopoly. The desert will blossom like a rose.

Name .....

Street and Box .....

City ..... State .....

MY FAVORITE RADIO STATION FOR GOSPEL PROGRAM IS .....

Dr. Springer testified that his buildings are made of concrete and steel and are 100% fireproof. In the motel there are 80 beds and he "will accept whatever God makes possible" (Tr. 374). At the time of the last hearing one-third of the people at the motel were not paying a cent. He has never taken a collection but "somehow or other the Lord supports us" (Tr. 375). Dr. Springer will take anybody as long as they leave alcoholic beverages alone and conduct themselves properly. At one time he offered to turn back the property to the Bureau of Land Management provided they would promise to feed the people and carry through the traditions he has started (Tr. 376).

In describing his radio broadcasting he stated that it was a natural entry to people who are interested in health and religion. The people can come to ZZYZX and enjoy the three concrete pools heated to 75°, 85°, and 100° respectively. The water is naturally 72°. Crystals are not added to the pools but can be added to tubs for a richer mineral content. He believes that the minerals open up the sweat glands of the body and

eliminates waste products which the kidneys cannot handle. There are happy people at ZZYZX who are surrounded by happy people. They all get plenty of sunshine and the right food. He believes that 50% of the improvement in health is the result of "Suggestotherapy" (Tr. 379). Everything that he has is given away. He stated that we do not "tell them they are free. We tell them this. If you have need for this product or if your doctor has recommended it, then we ask and say Thank God for a gift I am about to receive, and let him tell you whether or not he feels you should drop a contribution . . . ." (Tr. 381) The contributions are made in part to Dr. Curtis Howe Springer Foundation and to the ZZYZX Community Church. In 1968 alone the contributions amounted to three quarters of a million dollars (Tr. 296).

Through the years Dr. Springer has received many thousand of testimonials praising him for his work (Tr. 314). Six of the testimonials were received in evidence (Ex. O-1 through 6). These documents end:

> (1) "May God bless you and keep you strong"—from Sarasota, Florida; (2) "Yours in Christ"—from Flint, Michigan; (3) "May God bless you richly and supply your every need"—from Angelica, N.Y.; (4) "Enclosed find a contribution of $20 for your work"—from Waverly, Iowa; (5) "Still praying that God's will be done and you win all in the end"—from Waco, Texas; and (6) "I want to see you as I pray for you and the Lady your wife—would also like to get what can help toward rheumatic beginnings and its associated sickness—yours in Christ"—from Chicago, Ill.

The contestees also referred to gold and silver as being found within the group of claims. At one time Dr.

Springer and his son recovered approximately two pounds of black sand from the bottom of a well 12 feet from the surface. This well is on either Claim 4 or 7 (Tr. 354). Another sample was taken from a site near a pigsty on the boundary between Claims 6 and 7. The samples were assayed and the results were $9.80 and $2.10 in gold per ton (Ex. H, page 8). He did not know whether these values were the result of a fire assay or assay by amalgamation.

Earl Westerfeld, the chemist, testified that he has developed a new method of fire assay for placer material through an electrolysis process which is showing astonishing results. He assayed material from Quicy, California which ran $1500 a ton when assayed by his mew method. It had previously assayed $20 a ton by the old method. He was given 2 rock samples by Mrs. Root (Ex. B and C) and assayed them by the standard fire assay and by his new process. The results from the standard fire assay were $67.20 and $28.10 per ton in gold and silver and from his new process $78.72 and $125.00 per ton in gold and silver. Mr. Westerfeld suggested that the ore should be crushed, concentrated at least 20 to 1, and smelted. He pointed out that 100 tons of $28 ore if concentrated to 5 tons would be worth $2800. He estimated the cost of concentrating the material to be $10 to $12 a ton and the cost of smelting $40 to $50 a ton. Mr. Westerfeld did not know where the samples came from (Tr. 95-150).

Mrs. Helen Springer, a contestee and the wife of Dr. Springer, testified that she has been living at ZZYZX since 1944. They originally went on the land to find something in the soil or in the rocks which would help them stay on the property to do the other good work

they had in mind and wanted to accomplish. She secured a rock sample from Hank Miller who chipped it off a boulder lying near a white post where they are putting their new buildings. The samples assayed by Mr. Westerfeld were broken off this rock. Although they have recovered no gold or silver from the claims, they have been using the mineral water and shipping both mineral crystals and clay. She believes the crystals and clay are minerals because they are composed of minerals (Tr. 150-177).

In addition Dr. Springer claimed that there was a valuable deposit of sand and gravel on the western portion of the group of claims. The parties were in agreement that there is a massive deposit of sand and gravel along the base of Soda Lake Mountains, that it is hard and usable for construction purposes, including concrete aggregate, and that it was used for the construction of the buildings at ZZYZX. Dr. Springer testified that he let the State Highway Department take the sand and gravel from the claims and that he is willing to let the County Road Department or any individual use the material free of charge. Also a number of friends in Baker have used his sand and gravel. When asked how many tons he had sold he stated "I don't charge for those things" and "Good Lord—we are not interested in money." (Tr. 361).

Stuart Ingram, a mining engineer, was on the claims a short time before the hearing, and he verified that there was a massive deposit of sand and gravel. He agreed that the deposit could be used for construction purposes (Tr. 251-283).

On rebuttal Mr. Cruskie testified he was on the group of claims with Dr. Springer with the intention of

sampling cuts that Dr. Springer had agreed to excavate. Dr. Springer did not excavate the cuts. He told Mr. Cruskie that the values were within six inches of the surface on the lake bed and that it was not necessary to disturb the bed by cutting into it. Mr. Cruskie was taken to the site where Hank Miller had picked up the material which was assayed by Earl Westerfield. It was from the center of Claim 3 where there is nothing but loose boulders (Ex. 18). The sample was lode material taken from one of the loose boulders (Tr. 383-390). Also he testified that sand and gravel similar to that found on the claims is widespread throughout the area and can be found at the base of many nearby mountains (Tr. 395).

Applicable Legal Principles

The mining law requires the discovery of a valuable mineral deposit to validate a mining claim. Although the law does not define discovery, the Interior Board of Land Appeals recently summarized the tests for determining whether a discovery has been made in *United States v. William J. Bartels, Sr., Et al.,* 6 IBLA 124 (June 5, 1972). Here the Board held:

> "(W)here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." *Castle v. Womble,* 19 L.D. 455 (1894); See, *e.g., United States v. Bryan Gould,* A-30990 (May 7, 1969); *United States v. Lucille Lundy,* A-30724 (June 30, 1967); *United States v. Kenneth O. Watkins and Harold E. L. Barton,* A-30659 (October 19, 1967).

"Approbation to this rule has been given by the Courts on many occasions. See *e.g., Chrisman v. Miller,* 197 U.S. 313 (1905); *Best v. Humboldt Placer Mining Company,* 371 U.S. 334 (1963); *United States v. Coleman,* 390 U.S. 599 (1968). And where the location is of minerals in a lode or vein, '(T)here must be a vein or lode of quartz or other rock in place; the quartz or other rock in place must carry gold or some other valuable mineral deposit; and the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.' *Jefferson-Montana Copper Mines Co.,* 41 L.D. 320 (1912).

* * *

"Through a long line of decisions, the Department has distinguished between 'exploration' and 'development' as they relate to 'discovery' under the mining laws. The Department has held that the showing of mineralization which will justify further exploration may not be adequate to warrant development of a mining claim and that it is only when it can be said that a prudent man would be justified in expending his means in the development of a mineral deposit that a discovery has been made. See *e.g., United States v. Laura Duvall and Clifford F. Russell,* 65 I.D. 458 (1958); *United States v. Clyde R. Altman and Charles M. Russell,* 68 I.D. 235 (1961); *United States v. Ford M. Converse,* 72 I.D. 141 (1965), sustained in *Converse v. Udall,* 399 F. 2d 616 (9 Circ. 1968), *cert denied,* 89 S.Ct. 635 (1969); *United States v. Kenneth O. Watkins and Harold E. L. Barton, supra; United States v. Lucille Lundy, supra.*"

And in *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971) the Board considered the validity of a discovery of sand and gravel. Here the Board held:

> "This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra.* This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. . . . *Palmer v. Dredge Corporation, supra,* note 3; *Foster v. Seaton,* 271 F. 2d 836 (D.C. Cir. 1959); *Osborne v. Hammitt,* Civil No. 414 (D. Nev., August 19, 1964)."

The contestant has the initial responsibility of presenting sufficient evidence to establish a *prima facie* case in support of its allegation that there has not been a discovery of a valuable mineral deposit. Thereafter the burden shifts to the contestees to establish by a preponderance of the evidence that there has been a discovery of a valuable mineral deposit on each claim. *Foster v. Seaton,* 271 F. 2d 836 (D.C.Cir. 1959).

Findings and Conclusions

The contestant presented a *prima facie* case that there was not a discovery of a valuable mineral deposit on any one of the claims through the testimony of a mining engineer. He was on the claims both alone and with the contestees. He examined the materials exposed and available for examination. He also secured a U.S. Geological Survey report containing drill logs for holes

dug in Soda Lake. His conclusion was that the exposed minerals were not sufficiently valuable to satisfy the prudent man or marketability rule for a discovery. It thus became the burden of the contestees to establish by a preponderance of evidence that there was a discovery of a valuable mineral deposit on each claim.

Dr. Springer is a person with considerable zeal and personal magnetism. He has located 12,800 acres of public land under the mining laws in the California desert and on the land he has constructed a multimillion dollar health spa and resort. Through his ministry of the air he has access to a great many people and offers to send various products which he feels will contribute to the individual's health and well-being. With each gift he encourages contributions. He also invites individuals to stay in his resort without charge but again his guests are encouraged to make contributions either to the Dr. Curtis H. Springer Foundation or to the ZZYZX Community Church. It was with these contributions that he was able to construct the multimillion dollar resort.

Dr. Springer feels that by retaining the public lands he can keep people who drink alcoholic beverages and other undesirables off the land and can manage it more successfully than the Bureau of Land Management. Several times during the course of the hearing he referred to the fact that people who drink are barred from ZZYZX. He has offered to return the area to the Bureau of Land Management if the Bureau would carry out his plans and objectives.

His appeal is understandable. Anyone in need of spiritual, mental, or physical advice can go to his resort free of charge for an indefinite visit. While at the re-

sort the guest can utilize the facilities, eat good food, get plenty of rest, and sunshine, take mineral baths, enjoy the fellowship of friends, and obtain spiritual and physical advice which Dr. Springer appears willing to give. A satisfied guest can then make a tax deductible contribution to the Springer Foundation or the Community Church. Dr. Springer believes he is carrying out the will of God and helping "God's children." From the amount of the contributions made to him over the years it is certainly obvious that a great many people have confidence in him. But whether his activity on the claims is characterized as evangelism or something else is not the issue here. The only issue before this tribunal is whether Dr. Springer and his associates have made a discovery of a valuable mineral deposit on any one of the claims. They assert that the valuable minerals are salt crystals, mineralized clay, gold, silver, sand, and gravel.

The evidence on behalf of the contestees regarding the salt crystals is self-defeating. The Smith-Emery analysis disclosed that the crystals are silicates of sodium. Although Dr. Springer has no medical degree, he purports to be knowledgeable in the field of medicine. He believes that when the crystals are used as a bathing salt, they stimulate the sweat glands of the body which helps in the removal of waste which the kidneys are unable to handle, and that for this reason they are valuable. If this is true and the crystals do in fact constitute a valuable deposit, the crystals cannot be located. They can only be leased under the Act of February 25, 1920, 30 U.S.C. § 181 *et seq.* (1970). A similar problem is raised with the mineral springs. If the mineral springs have any medicinal or curative properties, and Dr. Spinger appeared confident that

they do have, the springs and the subdivisions in which they are located were withdrawn from entry by Executive Order No. 5389 of July 7, 1930, 43 CFR 2311.03 (b)(1). This was 14 years before the claims were located.

The analysis of the silt used for mud packs discloses that it has the constituent minerals of ordinary clay. If it is ordinary clay it is not a mineral subject to location under the mining law. Mr. Cruskie called the clay "dirt." On the other hand Dr. Springer believes that it is not ordinary clay and that it has some medical or curative value. Over the years many people have visited the health resort and used the clay as well as the other Springer products. Again from the amount of the contributions it appears that many were well satisfied. But there is no way from the record to affix a specific value to any one of the many products and services available at the resort. In the absence of more pursuasive evidence regarding the value of this particular clay, it must be considered an ordinary clay not subject to location under the mining laws.

The gold and silver found on the group of claims were within two rock samples of lode material taken from a piece of float rock which had eroded down from the mountains onto a placer claim. There was no serious contention that this mineralization was in the form of a deposit which could be developed into a profitable operation. A sample of black sand taken in 1948 from the 12-foot level of a well on Claim 4 assayed $9.80 per ton in gold. Dr. Springer did not know how this sample was assayed. If the sample was fire assayed, the value shown does not represent recoverable value.

If the sample was assayed by amalgamation, it represents sufficient value to induce further prospecting and exploration to determine whether there is a deposit of sufficient magnitude to induce development. In the past 23 years Dr. Springer did not prospect or explore this area further to determine whether there was a potentially valuable deposit of black sand. Apparently he was not impressed. In any case one sample showing this value does not satisfy the prudent man rule.

The final mineral claimed to be valuable by the contestees is the sand and gravel. This mineral is found in a massive deposit one half mile wide and four miles long stretching along the western tier of claims. The contestees have given the material away to highway contractors for road construction and to friends and neighbors for construction purposes, and they have used the material as aggregate in the construction of their resort. Regardless of how well intentioned a person is or how much he wishes to be of service to humanity, there is nothing in the mining law which authorizes the location of a mining claim for the construction and use of a health resort. Thus the use of the sand and gravel for the construction of the buildings and other facilities at the resort constitute a trespass. And the giving away of quantities of the material for occasional use for highway construction and by friends or neighbors does not satisfy the marketability rule of the *Coleman* decision.

Final Conclusion

The Buddie No. One lode mining claim, and the ZZYZX Claims Nos. Two, Three, Four, Five, Six, Seven, Eighteen, Nineteen, and Twenty placer claims are declared null and void for the lack of a discovery of a valuable mineral deposit.

Appeal

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of January 1, 1972). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with the notice and other documents is the Regional Solicitor, whose address appears below.

/s/ Graydon E. Holt
Graydon E. Holt
Hearing Examiner

Enclosure: Appeal Information

Distribution

Regional Solicitor, U.S. Dept. of the Interior, 7759 Federal Bldg., 300 North Los Angeles Street, Los Angeles, Calif. 90012 (Cert.)

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Standard Distribution

APPENDIX B.

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

United States
v.
Curtis H. Springer, et al.

Decided November 14, 1972.
IBLA 73-66

Appeal from a decision by Administrative Law Judge[1] Graydon E. Holt declaring appellants' lode mining claim (R 1888) and placer mining claims (R 1907) null and void.

Affirmed as modified.

Mining Claims: Contests—Mining Claims: Determination of Validity—

Rules of Practice: Government Contests

A mining claim is properly declared invalid where the government establishes a prima facie case of lack of discovery, and the contestee does not show by a preponderance of evidence that the claim is valid.

Mining Claims: Discovery: Generally

To constitute a valid discovery there must be shown to exist within the limits of the mining claim a valuable mineral deposit, which is sub-

[1]The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

ject to location under the mining laws and which would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

Mining Claims: Generally—Mining Claims: Discovery

The provisions of Rev. Stat. § 2332, 30 U.S.C. § 38 (1970), do not dispense with the necessity of proving a valid discovery on a mining claim.

Mining Claims: Location

A compound, of which sodium is a major constituent, is not subject to location under the mining laws; if disposable from the public lands it would be subject only to lease or permit under the Act of February 25, 1920, §§ 23-25, *as amended*, 30 U.S.C. §§ 261-263 (1970).

APPEARANCES: George W. Nilsson, Esq., and Monta W. Shirley, Esq., Los Angeles, California, for appellants. James E. Goodhue, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY MR. GOSS

Appellants have appealed from a decision dated July 6, 1972, declaring their one lode mining claim and nine placer mining claims null and void for failure to show discovery of a valuable mineral deposit on any of the claims.

Among the reasons for appeal, appellants assert that:

(1) The decision promulgates discovery requirements beyond those set forth in the mining laws, and hence the decision is unconstitutional legislation.

(2) In a mining claim contest, the government has the burden of proof.

(3) The Bureau of Land Management had no right to file a contest action.

(4) Title to an unpatented mining claim is substantially the same as fee title, and the government merely holds title in trust for the appellants.

(5) The Department is bound by a Geological Survey finding that the land is mineral in character.

(6) Under Rev. Stat. § 2332, 30 U.S.C. § 38 (1970), appellants are entitled to a patent.

(7) The decision is contrary to the evidence, appellants having proved a discovery under the prudent man rule.

(8) The decision is contrary to unspecified provisions of the mining laws, the Administrative Procedure Act and other applicable laws.

Appellants' principal contentions on appeal are identical to those asserted in their brief to the judge following the hearings in this case. After reviewing the record and decision, it is determined that his findings and conclusions as to the issues herein are correct. The Judge's statement that the use of sand and gravel for the construction of buildings for the resort facilities constituted a trespass is beyond the scope of the contest proceedings. With that exception, we adopt the Judge's decision as that of the Board and attach a copy hereto. The mining law has been administered by the Department in accordance with judicial and administrative precedents. That the claims now embrace a 40 room motel and an assorted investment of

some $700,000 is regrettable, but to paraphrase the decision below:

> There is nothing in the mining law which authorizes the location of a mining claim on the public lands for the construction and use as a health resort.

The decision does not impose discovery requirements beyond those set forth in the mining laws. Neither does the government have the burden of proof in a mining claim contest. The government has the burden of establishing a prima facie case of lack of discovery. The burden then shifts to the contestees to establish by a preponderance of the evidence that there has been a discovery of a valuable mineral deposit on each claim. *Foster v. Seaton,* 271 F.2d 836 (D.C. Cir. 1959). The government pressented its prima facie case through the testimony of Edward Cruskie, mining engineer. Appellants have failed to sustain their burden.

The authority of this Department to determine the validity of unpatented mining claims has been long recognized, and the owners of an unpatented mining claim do not gain full title to the claim until a patent is issued. The Supreme Court in *Cameron v. United States,* 252 U.S. 450, 460 (1920), stated the rule:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an

> unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.

30 U.S.C. § 38 (1970) provides that persons who hold and work their mining claims for a period equal to the time period prescribed by the statute of limitations for mining claims in the state where the claim is located, and who produce evidence thereof, shall establish a right to patent. Section 38 does not establish an independent means of acquiring title to a mining claim, nor does it dispense with the requirement that there be a valid discovery on each claim. In *Cole v. Ralph*, 252 U.S. 286 (1920) the reason for the discovery requirement is discussed at pages 305-07:

> The effect which must be given to section 2332, Rev. St., in circumstances such as are here disclosed—whether it substitutes something else in the place of discovery or cures its absence—is the matter we have to consider. That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording and transfer, and thereby to relieve against possible loss or destruction of the usual means of establishing such acts, is attested by repeated rulings in the land department and the courts. But those rulings give no warrant for

> thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.
>
> * * *
>
> As respects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim.

See also *United States v. Charles W. Kohl and Cora A. Kohl,* 5 IBLA 298 (1972), and *United States v. Richard A. Haskins, et al.,* 3 IBLA 77 (1971).

ZZYZX Crystals is a compound, a major constituent of which is sodium. That the land contains the mineral sodium is immaterial, since sodium is not subject to location under the mining laws. Sodium on the public lands, if disposable, would be subject to lease or permit at the discretion of the Secretary under the Act of February 25, 1920, §§ 23-25, *as amended,* 30 U.S.C. §§ 261-263 (1970).

The clay used in ZY-MUD facials has been found to be an ordinary clay not subject to location.

Appellants' other arguments have been reviewed, but do not merit reversal of the decision below.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellants' motion for summary decision is denied and the decision appealed from is affirmed as hereby modified.

/s/ Joseph W. Goss,
Joseph W. Goss, Member

We concur:

/s/ Frederick Fishman,
Frederick Fishman, Member

/s/ Douglas E. Henriques,
Douglas E. Henriques, Member

APPENDIX C.

Petition for Reconsideration Denied.

United States Department of the Interior
Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

Dec. 14, 1972

IBLA 73-66

United States v. Curtis H. Springer, et al. Riverside Contest 1888 and 1907; Mining Claims.

By letter and Petition of November 27, 1972, appellants have requested the Secretary to exercise supervisory jurisdiction over the above appeal and grant certain relief, including reversal of the Board of Land Appeals decision of November 14. The Office of Hearings and Appeals has been instructed to reconsider the matter on behalf of the Secretary, pursuant to the delegation set forth in 43 CFR 4.1 and 4.5.

The record on appeal was fully considered prior to the Board's decision. The letter and Petition have now been reviewed, but no argument or justiciable issue has been presented which would serve as a basis for a change in the decision.

Therefore, pursuant to the authority delegated to the Director and to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.5, the Petition is denied. This constitutes the final administrative decision within the Department.

/s/ James M. Day
James M. Day, Director

APPENDIX D.

Memorandum of Decision That Partial Summary Judgment in Favor of Plaintiff Should Be Granted.

United States District Court, Central District of California.

United States of America, Plaintiff v. Curtis Howe Springer, Helen Springer, Dr. Curtis H. Springer Foundation; and Basic Food Products, Defendants. Civil No. 68-1780-FW.

Filed: Feb. 28, 1973.

Plaintiff has moved for a partial summary judgment adjudicating that plaintiff is the owner of real property described in the Complaint and Supplemental Complaint herein, and that defendants do not have any right, title or interest in such real property and that defendants be ejected from such property and that plaintiff recover possession of such real property and that defendants be permanently enjoined from trespassing upon such real property. By its original Complaint, plaintiff sought an adjudication that plaintiff is the owner of such real property subject only to the effect, if any, of mining claims claimed by defendants thereon and that defendants are entitled to use such real property pending determination of the validity of those claims only for the purpose of exploring for minerals and mining and uses reasonably incident thereto, and for an injunction enjoining defendants from using such real property for any other purpose. This Court has heretofore granted partial summary judgment in favor of plaintiff and temporary injunction as prayed for.

Prior to the institution of this action, plaintiff had initiated proceedings before the Department of Interior

for the purpose of determining whether or not the mining claims of the individual defendants and others on such real property are valid or invalid.

Decision in the proceedings before the Department of Interior became final on the 14th day of December 1972. Plaintiff filed a Supplemental Complaint alleging finality of such decision and praying for judgment that plaintiff is the owner of the real property and that defendants have no right, title or interest therein and for Judgment of Ejectment and recovery of possession of such real property and that defendants be permanently enjoined from trespassing on such real property. Thereafter, plaintiff filed a motion for summary judgment. The motion came on for hearing and was ordered submitted, after oral and written argument, upon the administrative record before the Department of Interior wherein it was determined that the mining claims referred to are invalid.

The United States may elect to have an administrative determination by the Department of Interior as to the validity or invalidity of the mining claims. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). When the United States does so elect, as it did in the instant case, the function of the District Court is solely to determine whether or not the required procedural steps have been substantially complied with by the Department of Interior and whether or not the action of the Department of Interior is supported by substantial evidence on the record as a whole rather than being arbitrary or capricious or an abuse of discretion. Burke v. Carpenter, 387 F.2d 259 (9th Cir. 1967); Mark v. Celebrezze, 348 F.2d 289 (9th Cir. 1965); Seebach v. Cullen, 338 F.2d 663

(9th Cir. 1964). This Court cannot under such circumstances proceed to a trial de novo to determine the validity or invalidity of the mining claims in question. The contentions made herein by counsel for the defendants that they are entitled to a trial de novo on the question of validity or invalidity, are without merit.

There are ten mining claims in question; nine are placer claims and one was filed as a lode claim.

This Court has considered the record of proceedings before the Department of Interior and is satisfied that the required procedural steps were substantially complied with and that the decision of the Department of Interior is supported by substantial evidence on the record as a whole, and that such decision is not arbitrary, or capricious or an abuse of discretion for the reasons hereafter stated.

The evidence before the Department of Interior discloses that the United States did establish a prima facie case of lack of discovery on any of the claims. The government having so established a prima facie case, the burden then shifts to the mining claimants to establish by a preponderance of the evidence that there has been a discovery of a valuable mineral deposit on respective claims, or any of them. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The defendants did not sustain their burden.

Edward F. Cruskie, a mining engineer with the Bureau of Land Management of the Department of Interior, personally examined the one lode and nine placer claims which were the subject of the administrative proceedings. He spent six days at the sites of the claims. He testified that 75 to 80 per cent of the land in the area of the claims are covered by the fine silts

and muds of Soda Lake. Additional testimony of Cruskie is summarized as follows: The hills which are located within the area of the claims do not contain any outcrop of quartz or any materials that could be construed as having commercial properties. He found no shafts or tunnels or workings on the claims of a normal mining nature; that there were a few minor excavations but no evidence of excavations for mining purposes.

He testified that Soda Lake contains fine clay and silt bed materials and that deep core drillings by the United States Geologic Survey so established, and that the survey showed no rock salt beds or beds of potash or other beds of interest within the lake. He stated that the hills adjoining the claims to the west contained no quartz veins with base metals or gold that shed any values into the sediments of the lake bed (Rep.Tr. p 10). He said there was a little gravel along the easterly slope of the mountain range alongside the road but there was no washing or screening plant of a commercial nature that would imply any sand or gravel commercial plant (Rep.Tr. p 11). He did find in the area of the claims improvements appearing to be in the nature of a health resort and hotel involving various buildings, a swimming pool and a pond with extensive landscaping and approach roads and a power plant.

Mr. Cruskie stated that he had formed an opinion as to whether valuable minerals have been found within the limits of the lode claim and that in his opinion, based upon his field investigation and research, he found no valuable mineral deposits on the lode claim and that the land within the area of the lode claim is non-mineral in character (Rep.Tr. pp 35-37). He testified to the effect, based upon his examination

and research, and testing within the areas of the placer claims, that there was no gold or any indications of any minerals of significance within the areas of the placer claims and that there was nothing valuable in the way of mineral deposits on any of these placer claims (Rep.Tr. p 48).

He further stated that he had formed an opinion as to whether a prudent man would be justified in spending time and money on any of the claims involved in this proceeding with a reasonable expectation of developing a paying mine or mining thereon, and that in his opinion a prudent man would not spend his time and money and effort on the placer claims or the lode claim with the idea of trying to develop a paying mine with metallic or non-metallic values (Rep.Tr. pp 48-49). The law is clear that the Prudent Man Rule, also called the marketability rule, must be applied to the determination as to the validity or invalidity of a mining claim. U.S. v. Coleman, 390 U.S. 599 (1968).

Curtis Howe Springer contended that gold and silver samples had been found and that the sand and gravel within the placer claims are valuable minerals. He called one Mr. Westerfield, a chemist, who testified about assays which he had done on two rock samples brought to him by the then attorney for Mr. Springer. However, the record shows that actually such rock samples were loose rocks (i.e. lode material) found on placer claims (Rep.Tr. p 384), and thus no evidence of a lode deposit which could be developed into a profitable operation, nor did Curtis Howe Springer prospect or explore the areas further or try to develop any minerals thereon, his own witness Stuart Ingram so testified (Rep.Tr. p 258).

The decision of the Department of Interior that the showing concerning the claims of finding gold and silver did not show value sufficient to satisfy the Prudent Man Rule, is not arbitrary or capricious or an abuse of discretion and is supported by substantial evidence.

The contention of Mr. Springer that his "mud packs" were valuable minerals, is against the law as such mud packs are ordinary clay which because of its location and all the factual circumstances of this case, is not a mineral subject to location under the mining law because of the marketability test. Mr. Springer's claim that his salt crystals are in fact silicates of sodium and valuable minerals, is without merit for such crystals are likewise not locatable under the mining laws. See U.S. v. Coleman, supra; Foster v. Seaton, supra. The same is true with respect to Mr. Springer's contention that he has valuable mineral springs within the claims. Mineral springs are not locatable under the mining laws. 53 Interior Decisions 173-74 (August 16, 1930).

The contention of Mr. Springer that he has valuable deposits of sand and gravel is controverted by other testimony in the case. The witness Cruskie testified that the same minerals, i.e. sand and gravel, could be taken from anywhere on the slopes and the mountains from miles around, as well as other mountain ranges, and that the sand and gravel on the claims in question did not possess any special or distinct characteristics which would be unique or unusual in any way (Rep. Tr. p 394). Mr. Cruskie made a study of the values of sand and gravel deposits in remote desert areas and testified that even if there were a contract for the excavation for sand and gravel for local state highway

construction, that there would be a nominal value only for a Use Permit to make such excavation in remote areas such as here found. In substance, Mr. Cruskie testified that there was no other market for sand and gravel deposits in areas as remote as the area of the claims in question. He likewise testified that the materials within the lake are not valuable (Rep.Tr. p 404). Mr. Springer's witness, Stuart Ingram, testified that there are two full sections of gravel along the eastern slopes of the mountain which is to the west of Soda Lake and that the gravel would represent several million tons in quantity (Rep.Tr. p 255).

This court then does determine that the decision of the Department of Interior is supported by substantial evidence and is in accord with the law applicable thereto, and that it is not arbitrary, or capricious or an abuse of discretion, and that required procedural steps were complied with. The decision is therefore binding on this court.

This is a proper case for partial summary judgment in that there is no genuine issue of any material fact and is a case of judicial review of an administrative decision. Plaintiff is therefore entitled to partial summary judgment. The only remaining issue for decision is the amount of money damages, if any, which are recoverable by plaintiff.

The foregoing constitutes the conclusions of law of the Court. Partial summary judgment will be entered in accordance herewith but no judgment shall be entered until the Court shall cause to be signed and filed a formal judgment.

DATED this 26th day of February, 1973.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

APPENDIX E.

Partial Summary Judgment in Favor of Plaintiff.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. Curtis Howe Springer, etc., *et al.*, Defendants. Civil No. 68-1780-FW.

Filed: March 2, 1973.

Plaintiff's Motion for Partial Summary Judgment came on for hearing before the Court and the matter was taken under submission for decision after argument both oral and written by counsel. The Court has rendered its decision setting forth the summary of undisputed Facts and Conclusions of Law concerning such Motion. By such decision, the Court has ruled that plaintiff is entitled to a Partial Summary Judgment, and in accordance therewith,

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED:

1. The decision of the Interior Board of Land Appeals rendered on November 14, 1972, in Administrative Contest Nos. R-1888 and R-1907 declaring the mining claims of the defendants to be invalid is affirmed.

2. Plaintiff, United States of America is the sole owner of all rights, title and interests in and to the public domain lands more particularly described in the Complaint herein, as amended, as:

> The West One-Half of Section 11 and the Southwest One-Quarter and the Southwest One-Quarter of the Northwest One-Quarter of Section 2, Township 12 North, Range 8 East, San Bernardino Meridian, and the Southwest One-Quarter of the

Southeast One-Quarter of Section 20 (unsurveyed), the Northwest One-Quarter of the Southeast One-Quarter of Section 21 (unsurveyed), the Northwest One-Quarter of Section 27 and the Southwest One-Quarter of the Northwest One-Quarter of Section 35, Township 13 North, Range 8 East, San Bernardino, Meridian, County of San Bernardino State of California.

3. Plaintiff is entitled to the immediate possession thereof and is entitled forthwith to be restored to the exclusive management and control thereof.

4. The defendants herein have no right, title, or interest whatsoever, in the said public domain lands and have no right, title to or interest in any invalidated mining claims thereon.

5. The defendants are each and all hereby ordered forthwith to remove themselves and all their properties and possessions, their associates, and/or their employees from the said public domain lands.

6. A Writ of Possession shall forthwith issue to plaintiff pursuant to this Partial Summary Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

1. The defendants, their associates, employees, tenants, and all others acting with them, and/or on their behalf are permanently enjoined from in any manner trespassing upon or occupying any part of said property.

DATED: This 1st day of March, 1973.

FRANCIS WHELAN
United States District Court Judge

APPENDIX F.

Order Denying Defendants' Motion to Dismiss "Memorandum of Decision and Partial Summary Judgment" in Favor of Plaintiff.

United States District Court, Central District of California.

United States of America, Plaintiff v. Curtis Howe Springer, Helen Springer, Dr. Curtis H. Springer Foundation; and Basic Food Products, Defendants. Civil No. 68-1780-FW.

Filed May 1, 1973.

In this action this Court made and filed its Memorandum of Decision granting the motion of plaintiff for partial summary judgment.

Thereafter, defendants filed a motion entitled, "Motion to Dismiss Memorandum of Decision and Partial Summary Judgment and Petition for Oral Argument".

In their moving papers defendants contended that this Court erred in making a private examination of the record before the Department of Interior concerning the claimed mining claims of the defendants. Supplemental complaint had been filed by plaintiff alleging that the Department of Interior had held such mining claims invalid. Thereafter, plaintiff filed a motion for partial summary judgment and submitted the record of the Department of Interior concerning proceedings respecting such mining claims.

Defendants in their moving papers claimed that because in its Memorandum of Decision this Court had

stated that the defendants had asked for a trial de novo, the decision of this Court was improper. It is clear from the reporter's transcript at the time of the hearing for partial summary judgment, that defendants were asking for a trial de novo and were insisting that they had the right to introduce certain evidentiary matter which is not a part of the record before the Department of Interior. Also, defendants contend that when this Court privately read the record before the Department of Interior, this Court was in error. Defendants contend that they should be able to point out to the Court the portions of the record that should be considered.

Defendants' position is incorrect. The statute states that the Court can examine the entire record as the Court here did, *or* consider those portions of the record designated by counsel. This Court chose to read the entire record before the Department of Interior to determine for itself whether the administrative action of the Department of Interior is justified by the whole record in accordance with the principles applicable to administrative review.

Defendants' counsel has argued and re-argued over many hearings, and long before the hearing of the motion for partial summary judgment, the same contentions of law that he still argues. This Court by its Memorandum of Decision granting partial summary judgment dated February 28, 1973, ruled against the legal positions advocated by counsel for the defendants when this Court affirmed the administrative action of the Department of Interior. There is no reason to now change that decision.

Accordingly,

IT IS ORDERED that the motion of defendants heretofore mentioned is denied.

IT IS FURTHER ORDERED that execution of the partial judgment granting possession of the lands referred to in plaintiff's complaint is stayed to and including May 15, 1973, in order that defendants in the event they appeal may have an opportunity to petition the Court of Appeals for a stay of execution pending appeal.

DATED this 1st day of May, 1973.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

APPENDIX G.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, and United States District Court for the Central District of California, Plaintiffs-Appellees, vs. Curtis Howe Springer, aka Curtis H. Springer, and Helen Springer, husband and wife; Dr. Curtis H. Springer Foundation (aka Dr. Curtis Howe Springer Foundation); and Basic Food Products, Defendants-Appellants. No. 73-1876.

Filed: January 17, 1974.

Appeal from the United States District Court for the Central District of California.

Before: TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

THOMPSON, District Judge:

The early history of this case is related in an opinion of the District Court granting a partial summary judgment, *United States v. Springer,* 321 F. Supp. 625 (C.D. Cal. 1970), followed by issuance of a preliminary injunction, and in an opinion of this Court affirming, *United States v. Springer,* 478 F. 2d 43 (9th Cir. 1972). The facts as related in those opinions have not been materially controverted or changed in subsequent proceedings.

The prime thrust of the original complaint was that defendants be completely ejected from the premises in question. The effect of the preliminary injunction issued

*Hon. Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

June 18, 1971, which was the subject of the earlier appeal, was to prohibit any use or occupation of the mining claims by defendants other than for legitimate mining purposes. The instant appeal is from a summary judgment entered March 6, 1973, which, in substance, decrees that defendants have no right, title or interest in the public lands in question and orders their immediate ejectment therefrom.

The summary judgment was entered upon review of an administrative record produced in the Department of Interior after the United States had initiated proceedings in the Department contesting the validity of the ten mining claims (nine placer claims and one lode claim) relied upon by defendants to support their right to possession of several hundred acres of public domain.[1]

The final decision of the Interior Board of Land Appeals was made on November 14, 1972. Thereafter, the District Court permitted the United States to file a supplemental complaint in the pending ejectment action which alleged the invalidity of the mining claims based upon the final agency action by the Interior Board of Land Appeals. The entire administrative record was lodged with the Court and the action became one to review final agency action under the Administrative Procedure Act. The District Court sustained the administrative decision declaring the invalidity of defendant's mining claim locations.

On this appeal, defendants make several contentions, none of which have merit.

The defendants contend that the United States has no power under the mining laws to initiate a contest

[1]The then pendency of these contest proceedings was noted by this Court in the earlier opinion. 478 F. 2d 45, fn. 2.

of the validity of unpatented mining locations. This is not the law. *United States v. Coleman*, 390 U.S. 599 (1968); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920).

The defendant assigns as error the action of the District Court permitting the filing of a supplemental complaint and also the whole procedure of holding the principal action in abeyance pending an administrative determination of the validity of the mining claims by the Department of the Interior. This, however, is the very procedure which was approved by the Supreme Court in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). In the ejectment action as originally commenced, defendants' right to possession depended upon the validity of the mining claims. After final agency action was obtained, a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented" is plainly authorized by the rules. Rule 15(d), Federal Rules of Civil Procedure.

Defendants further contend that the Interior Board of Land Appeals and the District Court erred in holding that after the Government has presented a prima facie case of the invalidity of the mining locations, the burden of proof is on the locator to establish all the requirements for a valid location. Defendants rely on 5 U.S.C. § 556(d): "Except as statutes otherwise provide, the proponent of a rule or order has the burden of proof."

While, on the face of it, it may appear that the United States, when it initiates a contest of the validity of a mining location, is "the proponent of a rule or order," this is not the law. Many public land laws, in-

cluding the mining laws, give a person a right to initiate a claim to the public lands by his ex parte act of entry. If he thereafter complies with all requirements of the law, his initial entry may ripen into an enforceable claim to title as against the United States. The entryman is the true proponent of the rule or order within the meaning of the quoted section of the Administrative Procedure Act. *Foster v. Seaton*, 271 F. 2d 836 (D.C. C.A., 1959); *United States v. Toole*, 224 F. Supp. 440 (D.C. Mont. 1963); *Stewart v. Penny*, 238 F. Supp. 821 (D.C. Nev. 1965); *Converse v. Udall*, 262 F. Supp. 583 (D.C. Ore. 1966); *Unruh v. Udall*, 269 F. Supp. 97 (D.C. Nev. 1967).

Defendants' most strongly asserted contention is that the decision invalidating the mining locations is contrary to law. The undisputed proof is that these mining claims located at 1944 have been continuously occupied and used by defendants since that time. Defendants rely on 30 U.S.C. § 38:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim; but nothing in this chapter and sections 71 to 76 of this title shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent." 30 U.S.C. § 38.

This statute does not, however, give defendants any rights against the United States which they would not have had in the absence of the statute. *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432 (9th Cir. 1971). The statute "was not enacted as a statute of limitation, and has no application in the case of a trespasser on land, title to which cannot be acquired under the laws of the United States." *Chanslor-Canfield Midway Oil Co. v. United States,* 266 F. 145, 151 (9th Cir. 1920). In other words, the statute does not dispense with the requirement that a discovery of valuable mineral shall have been made. *Cole v. Ralph,* 252 U.S. 286 (1920).

The determination by the Interior Board of Land Appeals that there never has been a discovery of valuable minerals to validate the instant mining locations is supported by substantial evidence. Without detailing the evidence adduced at the administrative hearings, it is sufficient to state that defendants' long use of the land has been primarily for purposes of a health spa. Incidentally, defendants have gathered, packaged and distributed certain mud and salt compounds and have bottled and distributed medicinal waters from the area. But even defendants do not pretend that this was an important part of their resources. The products were not sold. They were distributed gratis to persons asking for them. Support came in the form of voluntary donations resulting from Dr. Springer's radio appeals. These activities cannot by any stretch of the imagination be considered the mining of valuable minerals within the

tests established by law. *United States v. Coleman,* 390 U.S. 599 (1968).[2] It is not enough to prove that the mining claims have been occupied and used and that material gathered therefrom has been exploited. The

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[2]"The Secretary's determination that the quartzite deposits did not qualify as valuable mineral deposits because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable.' It is a logical complement to the 'prudent-man test' which the Secretary has been using to interpret the mining laws since 1894. Under this 'prudent-man test' in order to qualify as 'valuable mineral deposits,' the discovered deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. . . .' Castle v. Womble, 19 L.D. 455, 457 (1894). This Court has approved the prudent-man formulation and interpretation on numerous occasions. See, for example, Chrisman v. Miller, 197 U.S. 313, 322; Cameron v. United States, 252 U.S. 450, 459; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336. Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

"The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Indeed, as the Government points out, the facts of this case—the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and the immense quantities of identical stone found in the area outside the claims—might well be thought to raise a substantial question as to respondent Colemen's real intention." *United States v. Coleman,* 390 U.S. 599, at 602-603 (1968).

evidence must show that the minerals taken intrinsically satisfy the prudent man test and the marketability test established by the cases. In this case, the evidence shows beyond cavil that whatever success was experienced in the distribution of products from the mining claims was not because of their intrinsic worth on the market.

The judgment is affirmed.

APPENDIX H.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, and United States District Court for the Central District of California, Plaintiffs-Appellees, vs. Curtis Howe Springer, aka Curtis H. Springer, and Helen Springer, husband and wife; Dr. Curtis H. Springer Foundation (aka Dr. Curtis Howe Springer Foundation); and Basic Food Products, Defendants-Appellants. No. 73-1876, DC# 68-1780 (FW).

Appeal from the United States District Court for the Central District of California.

Before: TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

PER CURIAM:

The petition for a rehearing is denied.

The suggestion of rehearing in banc does not comply with Rule 12, Rules of the United States Court of Appeals for the Ninth Circuit and is not considered.

The petition for a stay of execution is denied.

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*Hon. Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

APPENDIX I.

Excerpt From United States v. Gibbs, 13 IBLA 382.

"Evidence relating to past conditions bearing upon whether the claimants could have marketed material from their claims at a profit, e.g., quality and quantity of material, costs of extraction, removal and beneficiation, existence and size of the market, unit prices then prevailing, hauling costs and distances, etc., is not speculative, hypothetical, or theoretical by definition. Such evidence, whether real or parol, may be entirely factual. The conclusion based upon such facts is, of course, hypothetical since it relates to what could have been done in the past (the test imposed by this Department and the courts), but the hypothetical or theoretical nature of the conclusion does not characterize the evidence upon which it is based. To treat such evidence as speculative, hypothetical and theoretical and therefore insufficient to rebut the presumption is to give the presumption conclusive effect.

On the other hand, in any given case evidence of past conditions may well be so vague, uncertain, conjectural and inconclusive as to be fairly described as speculative and of insufficient weight to overcome the presumption of non-marketability.

Where, as in this case, the testimony shows that at a particular time the hauling cost was four cents per yard mile, based upon actual experience, such evidence is not to be discounted as "speculative, hypothetical or theoretical." But if, in another case, the showing was only that a profit might have been made if it had been possible to haul at four cents per yard mile, without establishing that figure as the actual or reasonable rate then prevailing, such evidence might well be regarded

as insufficient. In *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971), a divided opinion, the majority simply rejected the claimant's speculative contention that marketability could be shown where one *might anticipate* an *increased market* and a *depletion of better quality reserves;* i.e. Barrows' gravel was inferior to what the market was accepting in 1955, and no amount of speculation concerning the possible alteration of circumstances could improve it. By contrast, in the case at hand there is direct testimony from both sides that the quality is good for all purposes, and would have been accepted by the market. 13 IBLA 390

It has repeatedly been held that proof of actual sales of minerals from the claims is not an indispensable element in establishing their marketability, and that while lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction, this presumption may be overcome by evidence showing that the materials *could have been* extracted, removed and marketed at a profit before July 23, 1955. This rule rests on a strong foundation. *Verrue v. United States, supra; Barrows v. Hickel, supra; Palmer v. Dredge Corp., supra; Multiple Use, Inc. v. Morton,* Civ. No. 71-211 PCT-WCF (D. Ariz. Nov. 9, 1972); *United States v. Penrose,* 10 IBLA 332 (1973); *United States v. Harenberg,* 9 IBLA 77 (1973); *United States v. Humboldt Placer Mining Co.,* 8 IBLA 407 (1972); *United States v. Lloyd O'Callaghan, Sr.,* 8 IBLA 324 (1972); *United States v. The Dredge Corp.,* 7 IBLA 136 (1972); *United States v. Stewart,* (1972), *supra; United States v. Isbell Construction Co.,* 4 IBLA 205, 78 I.D. 385 (1971); *United States v. McCall,* 7 IBLA 21, 79 I.D. 457 (1972); *United States v. Stewart,* 1

IBLA 161 (1970); *United States v. Pierce,* 75 I.D. 270 (1968).

If proof of development and profitable sales is *not* the *sine qua non* of a valid mining claim, then we must hold that the presumption raised by the absence of development and sales *can* be overcome by proof that the claimants' showing that they *could have* extracted and sold material from the claim at a profit prior to July 23, 1955. This entails a showing of the market which *then existed,* the cost of extraction and processing which *would have been* incurred, the transportation charges which *would have been* involved, the unit price which *then* prevailed and the profit which claimants *might have* realized *if they had elected to proceed at that time.* This evidence of what the claimants could have done is, presumably, the "speculative, hypothetical and theoretical testimony" which the court said could not contradict their failure to actually do it in *Osborne v. Hammitt, supra,* and which the court held was sufficient in *Verrue v. United States, supra.*

In our opinion, such evidence of what the claimant could have done at the time, had he so elected, if credible, must be allowed to rebut the presumption of non-marketability raised by the lack of development and sales. It may not be excluded or held to be "insufficient" by characterizing it as "speculative, hypothetical or theoretical." This, essentially, was the holding in *Verrue v. United States, supra.* Otherwise, the presumption would be converted to an irrefutable conclusion because the true test (of what the claimant could have done) would not be susceptible of proof. In *United States v. Harenberg, supra,* we held:

> A favorable showing of bona fides in development is recognized as one of the factors which can serve

> to demonstrate the marketability of a mineral from a particular 13 IBLA 391 deposit, but development is not a requirement of the law and the fact of development or nondevelopment is merely evidentiary, the test being whether the present capability of profitably extracting the mineral exists, and, where location was barred after a given date, whether the mineral could have been extracted and removed profitably prior to the critical date. . . ." 13 IBLA 392

As pointed out in the opinion below, the Court held in *Barrows v. Hickel, supra,* p. 82, that actual, successful exploitation of a mining claim is not required to satisfy the prudent man test, noting that the Secretary had not required the appellant in that case to prove that he had an economically successful operation prior to July 23, 1955.

Accordingly, it is our opinion that the holding of the District Court on this point is *Osborne v. Hammitt, supra,* and cases following, has been effectively negated by the subsequent holdings of the Court of Appeals in *Barrows v. Hickel, supra,* and *Verrue v. United States supra.*[5]

Appellant, in its statement of reasons for appeal, states: "If the market is already being fully supplied or satisfied by other deposits, obviously additionally avail-

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[5] *United States v. Higbee,* A-31063 (April 1, 1970), *aff'd. Higbee v. Morton,* Civil No. 1674 (D. Nev. May 5, 1972)[a]; *United States v. Clear Gravel Enterprises, Inc.,* 2 IBLA 285 (1971); *United States v. McCall,* (1971) *supra; United States v. Osborne,* 77 I.D. 83 (1970); *United States v. Clark County Gravel, Rock & Concrete Co.,* A-31025 (March 27, 1970); *United States v. Benson,* A-31061 (September 4, 1969); *United States v. Pierce,* 75 I.D. 270 (1968); *United States v. Ramstad,* A-30351 (September 24, 1965); *United States v. Humphries,* A-30239 (April 16, 1965).

able material from other claims cannot be termed to be 'marketable'." The origin of this "notion"[6] is un-

known, but judging by the frequency of its appearance, it is strongly rooted despite its inherent fallacy. In the affluent, business oriented American society, well served by inter-connected transportation systems, almost all normal consumer demand is somehow supplied. This has never indicated that the market was closed to competition, particularly if the emerging competitor could offer lower prices, better quality, faster delivery, or other inducements. The mere fact that the needs of a particular locality may be fully supplied by one or more gasoline stations, grocery stores, restaurants or lumber yards in no way foredooms the efforts of those who would attempt to capture a portion of those markets. This issue should now be resolved by the pronouncement of the Court in *Barrows v. Hickel, supra,* which held that the claimant's ability to meet the marketability test cannot be made to depend on the extent of the market not already preempted by established operators.

We conclude that a showing which merely establishes that a given market is receiving an adequate supply is an insufficient basis upon which to rest a conclusion that supplies from another source are not marketable at a profit.

It is where the market is saturated by a superabundance of top quality goods from competitive sources at prices near the irreducible minimum that the advent of yet another would-be supplier must be viewed with the proverbial "jaundiced eye." *United States v. The Dredge Corporation, supra.* Similarly, where de-

[6]The characterization of this proposition as a "notion" was applied by the Court in *Barrows v. Hickel, supra,* at page 83.

mand is limited to a very few consumers who supply their needs from their own sources, so that the market is "closed" or "captive," we have held, quite properly, that a mining claimant must prove that the consumers will buy the produce of his claim at a profit, failing which it will be assumed that his mineral deposit has no economic value and does not qualify as a discovery. *United States v. Duval,* 1 IBLA 103 (1970), *aff'd. Duval v. Morton,* 347 F. Supp. 501 (D. Oregon 1972); *United States v. Bartlett,* 2 IBLA 274, 78 I.D. 173 (1971).

Other cases rest on a finding that the deposit was too remote from the market, *United States v. McCall,* 1 IBLA 115 (1970), or based upon speculation that a market would develop, *United States v. Isbell Construction Company, supra,* or where the quantity or quality was so deficient that mining operations could not be justified, *Hendrikson v. Udall,* 229 F. Supp. 510 (D. Calif. 1964), *aff'd.,* 350 F.2d 949 (9th Cir. 1965), *cert. denied,* 370 U.S. 940 (1966), or where no established market for the material existed, *United States v. Pulliam,* 1 IBLA 143 (1970), or where some physicial impediment would make production costs prohibitive, *United States v. McCall,* 7 IBLA 21, 79 I.D. 457 (1972).

Another oft-stated misconception, encountered again in this case, is the proposition that "To satisfy the marketability test, a mining claimant must show the existence of *a demand for the material on his specific claims,* and not simply a general demand for the type of material in question."[7] To require this of the claimant

[7]We must acknowledge our own contribution to the perpetuation of this fallacy. *See, e.g., United States v. McCall,* 2 IBLA 64, 78 I.D. 71, 80 (1971), *United States v. Osborne,* 77 I.D. 83 (1970); and cases therein cited.

is to impose, in most instances, an impossible burden on him. The buyers of common sand, gravel, rock, cinders, etc., ordinarily could not care less which claim their supplier (or *his* supplier) took it from, so long as it was legally obtained and the price is competitive. Those whose demands create the market are unlikely even to be aware of a particular claim as an undeveloped potential source of supply, and, if they were, it is unlikely that they would generate a demand for the produce of that specific claim in the absence of a critical shortage. This is in no way indicative that the material from that claim was, or is, precluded from the existing profitable market.

The origin of this misconception seems to lie in the inversion by restatement of the perfectly valid proposition to the effect that a mining claimant must show that material from his specific claim can supply an existing market demand for such material at a profit. *United States v. Pierce, supra; United States v. Boyle,* 76 I.D. 318 (1969); *United States v. Stewart,* (1972), *supra.* It is nothing more than a simple expression of the marketability test which was approved by the Supreme Court in *United States v. Coleman, supra.* This is altogether different from requiring the claimant to show the existence of a demand for the material from his specific claim." 13 IBLA 394

APPENDIX J.

Transcript of Department of Interior Proceedings Contest Nos. 1888 and 1907, Testimony of Mr. Ingram.

. . .

"Q Can you state what you saw there?

A I saw the—first I saw the evaporation ponds, and I saw the crystals that they gathered from it, the crude crystals. That is the way they gathered them.

I saw the impact mill where they ground them up, and the rest is a matter of packaging.

Q And how extensive examination did you make to see how much mineral was covered?

A I don't know exactly what you mean. You mean the amount of minerals?

Q Yes.

A Oh, that would be hard—because that whole lakebed, solar lake, is just filled with it.

Q So that these minerals are very extensive?

A Oh, yes.

Q In where they are.

A Yes. Oh, yes.

Q And you told us about the size of the sand and gravel deposit.

A Yes.

Q Which you said was millions of acres—of tons?" p. 261.

"CROSS-EXAMINATION

BY MR. WHEATLEY:

Q You testified first, I believe, Mr. Ingram, concerning your examination of the sand and gravel that you found on the claims.

A Yes.

Q Does the sand and gravel contain or possess" (p. 263) "any special or distinct properties that you could determine?

A Very excellent sand and gravel.

Q Well, that is not what I am asking.

A For concrete work.

Chemically, you mean?

Q Yes. That isn't exactly what I am asking you. I am asking you whether or not the gravel and sand is of a special or unique property that has some property to it which would set it apart from other sand—

A It does have this, that it is not—it is mostly rock, but it is not rock that has to be broken loose. It is a deposit, and it consists of a sizing arrangement that is very useful.

Q Would it bring in a marketplace a price higher than an ordinary—that other sand and gravel that would be used for the same purpose?

A Well, the price of sand and gravel depends upon its location.

Q That is what I am asking you. Would it bring any—would it bring—

A I don't know if there is any other quality of this size within its reach." p. 264.

APPENDIX K.

Transcript of Department of Interior Proceedings, Contest Nos. 1888 and 1907, Testimony of Mr. Cruskie.

. . .

"Q In your opinion does the sand and gravel on these claims possess any special or distinct characteristics which would make it unique or unusual in any way?

MR. NILSSON: Just a minute.

To which I object. There is nothing in the law which says that sand and gravel has to be unique. If it is sand and gravel, it is a mineral.

HEARING EXAMINER HOLT: Overruled.

You may answer the question.

A Will you repeat the question?

BY MR. WHEATLEY:

Q The question was in your opinion does the sand and gravel on the claim possess any special or distinct characteristic which make it unique or unusual in any way?

A No. It doesn't.

Q On what do you base your conclusion?

A Well, as the gentleman this morning said", (p. 394) "even though it is high silica, up to 90 in the solid form, you couldn't say that it would be suitable for crushing and making silica flour, because there is obviously too much iron in there to make anything but bottle glass, which is the finished bottle glass, can be gotten out of the chutes here at Corona for $5 a ton, 300 mash, and as far as construction material is concerned, I have no doubt it will stand there a thousand

years when it is properly mixed with cement, but you could also get that same sediment, they are well written-up by Geological Survey bulletin, very durable material, from the flanks of the Soda Mountains, where the alluvial slopes are for miles and miles around." p. 395.

"Q My question was have you investigated the marketability of the sand and gravel?

A Yes. I have looked into this, not only by inquiry as to what was used for in regard to the buildings and structures of the claims but looked into the population figures and asked a few questions around Baker.

And we have had over the last few years quite a few cases of contracts in the desert area for State highway construction which has given us a basis about what value we assign to this government material for this public purpose.

And we have found, too, that most of this material falls in a general category. Most of those sand and gravel alluivals are very durable, volcanics, anthractic or metamorphic rocks originally, anthractic." p. 400.

"A And so we attach a nominal value for these are permits which generally go to contracts for five or ten cents a cubic yard.

And my opinion was that a small user, a domestic user, of sand and gravel if he wants to use a little material like that around his house, he just probably loads up at any wash out of his pickup. He doesn't ask anybody.

So that is how scattered the market is with just a small population.

They are isolated, miles from big cities.

HEARING EXAMINER HOLT: How far is it from a city?

A Oh, it is about 70 miles from Barstow.

HEARING EXAMINER HOLT: Which way?

A It would be northeasterly, and—

BY MR. WHEATLEY:

Q Have you compared the sand and gravel with other sand and gravel deposits in the general area?

A Yes.

They fall in similar category or acceptability, durable. That area is—has had a lot of metamorphises.

Generally when you have metamorphised rocks," p. 401 "alluvial materials are good and durable, because the components of them are liable to wear or are already either solidified again or worn out by action.

So they are on the par over miles and miles of similar good for construction sand and gravel material." p. 402.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1771

CURTIS HOWE SPRINGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner constructed and operated a forty-room resort or "health spa" on the public domain. The United States brought an action of ejectment against petitioner in the district court and petitioner asserted an allegedly valid mining claim in defense. The Bureau of Land Management of the Department of the Interior contested the validity of petitioner's mining claims. The district court entered a preliminary injunction prohibiting petitioner from using or occupying the mining claim lands other than for legitimate mining purposes (321 F. Supp. 625) and the court of appeals affirmed (478 F. 2d 43).

The Department of the Interior determined that petitioner's mining claims were invalid because there was no "discovery of a valuable mineral deposit" as required by the federal mining laws (Pet. Apps. A-C, pp. 1-35). The district court, finding that the Department's

decision was supported by substantial evidence, granted the government's motion for partial summary judgment. The court held that petitioner had no interest in the land in dispute and accordingly a writ of possession was issued to the United States (Pet. App. E, p. 44). The court of appeals affirmed (491 F. 2d 239).

1. Petitioner's primary contention is that 30 U.S.C. 38 removes the requirement of discovery of a valuable mineral deposit where the claimant has been in possession for a period equal to the period of the applicable state statute of limitations. Section 38 provides in relevant part that where claimants "* * * have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto * * *." Petitioner's contention that Section 38 removes the requirement of discovery was rejected by this Court in *Cole* v. *Ralph*, 252 U.S. 286, where it was held that Section 38 is merely a remedial provision designed to substitute proof of holding and working for the prescribed period for proof of acts of location, recording and transfer. This Court expressly held that the discovery requirement is unaffected (252 U.S. at 305-307):

> As respects discovery, the section itself indicates that no change was intended. Its words "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. * * *

As the court of appeals noted, petitioner's "long use of the land has been primarily for purposes of health spa," and while petitioner did gather and distribute certain mud and salt compounds, the court of appeals correctly held that "[t]hese activities cannot by any stretch of the imagination be considered the mining of valuable minerals" (Pet. App. G, p. 52).

2. Petitioner's remaining contentions are also without merit:

a. "Bathing salts" are not locatable minerals under the federal mining laws. The "bathing salts" found on the land which petitioner claims are a compound in which the primary constituent is sodium. As the Department of the Interior found, "[s]odium on the public lands, if disposable, would be subject to lease or permit at the discretion of the Secretary under the Act of February 25, 1920, §§23-25, as amended, 30 U.S.C. §§261-263 (1970)" (Pet. App. B, p. 33).

b. Contrary to petitioner's contention, the burden of proof as to discovery is on the mining claimant. See, *e.g.*, *Foster* v. *Seaton*, 271 F.2d 836 (C.A.D.C.); *Converse* v. *Udall*, 399 F. 2d 616 (C.A. 9), certiorari denied, 393 U.S. 1025.

c. Petitioner's contention that the government is estopped to deny his claim to a portion of the public domain is in effect a claim that public lands can be acquired by adverse possession. It is well settled that estoppel is not a defense to a suit by the government to enforce public rights or protect public interests (*United States Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5), and this principle is particularly applicable in the administration of public lands. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389.

In any event, assuming *arguendo* that estoppel could be asserted against the government, in the present case there was no government inaction constituting estoppel (see 478 F. 2d at 45, n. 2).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Brief is submitted by Petitioners pursuant to Rule 24 in reply to the Memorandum for the United States in Opposition filed by the Solicitor General of the United States.

1. In its Memorandum, the United States asserts that Petitioners have contended "that 30 U.S.C. 38 removes the requirement of discovery of a valuable mineral deposit where the claimant has been in pos-

session for a period equal to the period of the applicable state statute of limitations." (Memo. p. 2). This characterization of Petitioners' contentions is erroneous. At no time have Petitioners contended that 30 U.S.C. 38, which is applicable to holding of mineral lands over long periods of time, removes the element of discovery. Petitioners have asserted that said section lowers the burden of proof as to the element of discovery as well as other elements usually required to establish a mining claim, but nowhere have Petitioners contended that discovery is not required. Petitioners argue that such lower burden of proof should have been applied in the proceedings below instead of the higher burden actually employed.

2. The United States further asserts, and quotes from the Court of Appeals below, that Petitioners' "activities cannot by any stretch of the imagination be considered the mining of valuable minerals." (Memo. p. 3). Petitioners submit that this very point is the subject of extensive argument in the Petition (Pet. pp. 26-34) and cannot be summarily dismissed by a quotation unsupported by rebuttal argument, particularly since Petitioners' argument demonstrates that this view of the Court of Appeals is erroneous.

3. The Memorandum in Opposition next suggests that Petitioners are attempting by this action to locate "bathing salts" and that "bathing salts" are not locatable because their primary constituency is sodium. (Memo. p. 3). Again, this is an erroneous interpretation of Petitioners' contentions. The Petition adequately demonstrates why such a neat and pat characterization is in error, because the minerals are not relied upon chiefly for the sodium contained in such minerals and, if the Government's argument has any

validity, the natural pervasiveness of sodium would prevent almost all mining activities and minerals from being subject to location. (Pet. pp. 26-28).

4. The Memorandum in Opposition asserts that Petitioners bear the burden of proof in this case, citing two cases for this proposition, *Foster* v. *Seaton,* 271 F.2d 836 (D.C. Cir. 1959); *Converse* v. *Udall,* 399 F.2d 616 (9th Cir. 1968), *certiorari denied,* 393 U.S. 1025 (1969). (Memo. p. 3). These cases, however, relate to the burden of proof required under other parts of the Mining Laws and do not consider the extent of the burden of proof required under 30 U.S.C. 38. The Petition herein (pp. 15-22) adequately shows that 30 U.S.C. 38 establishes a lower burden of proof as to the element of discovery for a long term claimant and that Petitioners have met this burden.

5. The United States urges on this Court the proposition that estoppel does not apply against the federal Government. (Memo. pp. 3-4). Petitioners, on the other hand, have adequately pointed out why the doctrine of estoppel should apply in this case. As shown in the Petition, the United States Court of Appeals for the Ninth Circuit, has applied estoppel against the federal Government in circumstances very similar to that presented here. *United States* v. *Lazy F C Ranch,* 481 F.2d 985 (9th Cir. 1973). As pointed out in that case, justice and fair play on the part of the Government when dealing with its citizens in circumstances such as those involved in the instant case require that the Government be estopped from denying the validity of Petitioners' claims. The Government has simply ignored this case and the reasoning set forth therein.

6. The United States contends that, in any event, there were no circumstances constituting estoppel. (Memo. p. 4). Petitioners attempted to argue estoppel in the District Court but the court there held, erroneously, that such issue was not applicable. (Hearing on Application of Defendant for Stay of Injunction Pendente Lite, August 2, 1971, Tr. pp. 5-7); (Contempt Proceeding, October 20, 1973, Tr. pp. 212-213); and (Hearing on Motion for Partial Summary Judgment, January 9, 1973, Tr. p. 19). Consequently, no direct evidence on that issue was introduced. Nevertheless, the record shows the elements of estoppel have been established, (See Pet. pp. 23-25), and the factors supporting such elements have not been denied previously by the Government.

In short, the Memorandum for the United States in Opposition disregards the facts, the Mining Laws of the United States and the applicable decisions of this Court. The Petition for a Writ of Certiorari should accordingly be granted.

Respectfully submitted,

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